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REPORTS

OF

⁴⁰CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,
REPORTER.

VOLUME LXII.

CONTAINING THE REMAINING CASES SUBMITTED AT THE SEPTEMBER
TERM, 1871, AND A PORTION OF THE CASES SUBMITTED
AT THE JANUARY TERM, 1872.

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CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1871.

MASON B. LOOMIS.

v.

JOSEPH GERSON.

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1. **HOMESTEAD EXEMPTION**—a *protection against judgments rendered in criminal prosecutions*. Under the laws of 1851 and 1857, the homestead is exempt from sale under a judgment for a fine and costs rendered in a criminal prosecution against the husband for a misdemeanor.

2. **SAME**—*sale of homestead—whether should be set aside*. But where the homestead was sold under such a judgment, it was held, that if the purchaser would pay to the grantee of the judgment debtor the \$1,000 exemption, he should be permitted to do so, and retain the title.

APPEAL from the Circuit Court of Livingston County; the Hon. CHARLES H. WOOD, Judge, presiding.

This was a bill in chancery, in which the complainant, Joseph Gerson, alleged that, on the first day of April, 1868, one Peter I. Neilson, being indebted to Nelson Anderson, on a promissory note for \$350, with his wife executed a mort-

(11)

Opinion of the Court.

gage to said Anderson to secure such indebtedness, conveying lot nine, in block fifteen, in the town of Dwight, county of Livingston, in the State of Illinois, and that on the first of July, 1868, said Neilson being further indebted to said Anderson on a promissory note of that date for \$350, to secure the same, executed to said Anderson another mortgage on the same premises.

It was further alleged in the bill that, at the January term, 1869, of the Circuit Court of said county, said Neilson was indicted for selling liquor without a license, and that at the May term, 1869, of said court, Neilson was found guilty thereon, on twenty counts, and fined in the sum of \$200 and costs; that, on the 21st day of May, 1869, execution and fee-bill were issued for the collection of said fine and costs, and that by virtue thereof the sheriff levied on said premises, and sold the same to the defendant, Mason B. Loomis; that, on the 23d day of March, 1869, said Neilson and wife conveyed said premises, by warranty deed, to complainant, releasing homestead; that, on the 25th day of March, 1869, complainant paid the full amount of the Anderson mortgages, and that said Anderson executed releases of the same, which were recorded.

The bill then alleges that, at the time of the finding of said indictment, said lot nine was the homestead of said Neilson, who was then and there a householder and the head of a family, and residing with them thereon, and that Neilson continued to reside on, and occupy said lot for a long time prior to the finding of said indictment, and until the same was conveyed to complainant; that said premises were not worth to exceed \$1,800, the amount paid by complainant; that said premises were not sold by the sheriff as required by law, under the provisions of the Homestead Act, and that said sheriff's sale constituted a cloud on the complainant's title. Prayer that the levy and sale be set aside.

The defendant filed a general demurrer to the bill, which was overruled by the court, and a decree entered setting aside the sale.

Opinion of the Court.

The defendant appeals.

Mr. MASON B. LOOMIS, appellant, *pro se*.

Mr. A. E. HARDING, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

We held, in *Conroy v. Sullivan*, 44 Ills., 451, that, under the laws of 1851 and 1857, the homestead was protected from sale under a judgment obtained against the husband for his torts, as well as under one obtained for violation of his contracts. The object of these laws was to furnish a shelter for the wife and children, which could not be taken away or lost by the act of the husband alone. This principle must equally exempt the homestead from sale under a judgment for a fine and costs rendered in a criminal prosecution for a misdemeanor. The wife is not to suffer for the wrongful act of the husband. The State must submit to the same exemptions of a defendant's property that it imposes upon its citizens. The court, therefore, did not err in overruling the demurrer to the bill.

The sale, however, should not be absolutely set aside. All that the judgment debtor has a right to claim is \$1,000, and if the defendant prefers to pay that sum to the complainant, who stands in the shoes of the judgment debtor, he should be permitted to do so, and retain the title.

The mortgages paid by the complainant were extinguished by his payment in the manner stated in his bill.

For the error in setting aside the sale absolutely, the decree must be reversed and the cause remanded.

Decree reversed.

Syllabus.

JAMES H. CARR

v.

ANSON RISING *et ux.*

SAME

v.

SAME.

1. MORTGAGE—*when a deed is.*—Where a person advances money, and at the same time receives a deed and gives back a bond to the grantor for a reconveyance, these facts incline to the belief that the transaction is a loan and a security; but not so, when the conveyance is made by the person to whom the consideration is paid, and the obligation to convey is given to another.

2. SAME.—When the owner of land caused the party holding the legal title to convey the same to the defendant for the consideration of \$2,300, the full value of the premises, taking back a bond for a deed upon payment of \$2,401, in one year thereafter, and a lease of the premises, and when sued in forcible detainer for possession, filed no bill to restrain the proceeding and have the transaction declared a mortgage until over two years afterward, and permitted the grantee to expend about \$1,500 in improvements without asserting any right, and no obligation was given to the grantee for the payment of the money advanced by him, so that he might foreclose if the transaction was intended as a mortgage, and the former owner while in possession directed the assessment of the land to the defendant, and in a former suit in answer to a cross bill, denied that defendant had given the bond for reconveyance; and when the witnesses present at the execution of the deed, when all the parties were present, did not understand the transaction to be a security for money loaned: *Held*, on bill filed to redeem, that the transaction could not be regarded as in the nature of a mortgage, a security for money loaned, but was an absolute sale.

3. HOMESTEAD—*abandonment.*—When a husband and wife had conveyed their homestead to A to secure a debt, and afterward procured A to convey the same to B, who paid the debt and something over, and B thereupon leased the premises to the husband, and gave the wife a bond for a deed to be made upon payment of a given sum within one year, but dispossessed them by forcible detainer before the expiration of the lease, and they left this State and resided about two years in Nebraska: *Held*, that if the hus-

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band and wife had any homestead right in the premises, it was abandoned and lost by their removing to and acquiring a home in Nebraska.

APPEAL and WRIT OF ERROR from the Circuit Court of Jo Daviess County; the Hon. BENJ. R. SHELDON, Judge, presiding.

Mr. JAMES H. CARR, *pro se.*

Mr. D. W. JACKSON, attorney for appellees and defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

These two cases have grown out of the same transaction, and the latter is but a continuation of the former, and we shall consider and dispose of them in one opinion. It appears that Mrs. Rising was the owner of the property in controversy; and, for the purpose of borrowing money for the use of her husband, gave a note for \$2,057.23, and executed a trust deed to one Myers to secure the same, on the 12th day of December, 1857, payable one year after date; that after the money thus loaned had become due, on the 17th day of December, 1858, defendants in error executed to Myers a warranty deed for the premises, when he extended the time for payment one year. He at the same time executed a bond for a reconveyance of the premises when the money should be paid.

On the 24th of March, 1859, after the money had become due, Anson Rising, Myers, and plaintiff in error, came together, when the latter paid to Myers \$2,395, and he thereupon conveyed the premises to plaintiff in error, and he also paid Rising some money. On the 26th day of March, 1859, plaintiff in error executed to Mrs. Rising a bond for a reconveyance, on her paying to him on or before the 24th day of March, 1860, the sum of twenty-four hundred and one dollars, and a strict performance by payment is made of the essence

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of the contract. From this bond was excluded one and a half acres of the tract. Defendants in error remained in possession until some time in the month of August of the same year, when plaintiff in error recovered the premises in an action of forcible entry and detainer. Defendants in error soon after removed to and settled in Nebraska.

In December, 1862, defendants in error filed a bill in chancery claiming a homestead right in the premises, and that the conveyance by Myers to plaintiff in error, although a deed in form, was intended as and was but a mortgage; but the bill did not ask an account or pray for leave to redeem. Plaintiff in error answered the bill, denying their right to a homestead, and claiming that the transaction was intended to be, or was in fact, an absolute conveyance. He also filed a cross bill, in which he alleged that he had made an absolute purchase of the premises; that Rising had improperly possessed himself of the bond given by Myers to Mrs. Rising; prayed that it might be surrendered up and canceled, and that his title be confirmed as an absolute fee simple. On a hearing, the court below decided that defendants in error were not entitled to a homestead in the premises, but held that the deed from Myers to plaintiff was a mortgage, but rendered no decree for an account, the payment of the money, or leave to redeem; and the suit went from the docket.

No change occurred in reference to the matter, nor were any steps taken until the 10th of October, 1867, when defendants in error filed a bill, wherein they set forth the facts; and, that after plaintiff in error received from Myers the conveyance, they received a lease from plaintiff in error for sixteen months, but were dispossessed on the 20th of August, 1860, by proceedings in forcible detainer. They claimed in the bill that the conveyance to plaintiff in error was only a mortgage. They pray that they be permitted to redeem; that an account of the rents and profits be taken, and upon payment of the balance, plaintiff in error be required to reconvey the premises to them. He filed an answer denying that he loaned them any money, but insisted that he had purchased the property ab-

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solutely. On a hearing, the court below granted the relief sought, and ordered an account to be taken and stated; and on the report of the master having been filed, and exceptions thereto being overruled, a final decree was entered, requiring a reconveyance upon payment of the sum found due. The record of both cases is brought to this court, and errors are assigned thereon.

The first question we shall consider is, whether the decree rendered in the first case is sustained by the facts in evidence on the hearing. If that decree was proper, then it follows that defendants in error had a right to redeem, and that question could not be litigated on the trial in the second case. In form, this was a purchase by plaintiff in error, and a re-sale; but it is urged that the facts show it to have been a loan of money by him, and the conveyance only received as a security. Tisdale, the father of Mrs. Rising, testified that money was borrowed of Myers, and Mrs. Rising gave a deed of trust on the premises to secure its payment; that, subsequently, she and her husband conveyed the premises to Myers, and that they borrowed over two thousand dollars of plaintiff in error, and Myers conveyed to him. That Rising sold one and a half acres of the tract to plaintiff in error. He says the rate of interest was twenty-five per cent. But this witness is unable to state the amount advanced by plaintiff in error. He says he thinks it was \$2,100 or \$2,200, but is not certain. He says it was his understanding plaintiff was to give a bond for a reconveyance, but does not know that it was given. He says it was almost impossible to sell land for cash in that neighborhood at the time the transaction occurred.

Myers testifies as to his conveying the land to plaintiff in error on the written request of Mrs. Rising, but seems to have had no information in regard to the intention of the parties. Some four or five witnesses fix the value of the property at the time, from \$1,800 to \$2,500, but none fix a higher valuation upon it. Platt, who drew the deed to plaintiff in error, seems to have the clearest recollection of the transaction of any of the witnesses so far as they come to his knowledge. He

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says, when the deed was made, Rising refused to take currency unless it was made equal to specie, and that one per cent was added for that purpose; that he drew a check for the amount, and it was received by Myers; that he paid for plaintiff in error as the consideration for the land, \$2,242.71 to Myers, and to him another sum of \$95, and to Rising for his wife, \$57.29, making an aggregate of \$2,395. He says there was a contract between defendants in error and Myers to sell him a part of the land, and that plaintiff in error paid him and took up the contract. That some difficulty occurred after the check was delivered and the deed executed, on account of Myers' bond, and Mrs. Rising's written consent having been taken by some one not entitled to receive them; and Myers swears that they were secretly taken and retained by Rising.

Here are found several strong circumstances indicating that it was regarded by the parties as an absolute sale. First, they gave it that form. Next, plaintiff in error paid the full value of the property. Again, Rising leased the premises from plaintiff in error. Not only so, but when he procured possession defendants in error filed no bill to restrain the proceeding, or to have the transaction declared a mortgage, for something more than two years afterward, and removed to and settled in another State. They permitted plaintiff in error to make improvements, amounting to about \$1,500, on the premises, without asserting any right. We can hardly suppose he would have made such improvements if he had supposed he held only a mortgage. This all points strongly to the deed as being absolute, and not conditional. Again, no obligation was taken by plaintiff in error for the payment of the money. If designed to be a mortgage, common prudence would have suggested a different course, as we can not suppose a person would be willing to leave himself indefinitely in the position that he could be compelled to convey or release the premises from a mortgage, and yet be wholly unable to enforce payment.

Nor is the case so strong as where a person advances money, receives a deed, and at the same time gives back a bond to the

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grantor for a reconveyance. That of itself inclines to the belief that it was intended as a loan and security. But not so as in this case when the conveyance is made by a person to whom the consideration is paid, and the obligation to convey is given to another. But it is in form an ordinary purchase and resale. *Taintor v. Keys*, 43 Ill., 332. Notwithstanding Tisdel's testimony, which is indefinite, uncertain, and seems largely to consist of his conclusions, and not in a statement of facts, we think this *prima facie* sale has not been shown to have been a loan and security.

Again, Tisdel swore it was a loan at twenty-five per cent. All of the facts in the case contradict this supposition. One year's interest at twenty-five per cent would be a trifle over five hundred and ninety-eight dollars. In this the witness is evidently mistaken, or has given a false version of the transaction, and renders his own evidence conflicting. Even take the lowest amount he names as having been paid, and one year's interest, at that rate would amount, principal and interest, to \$2,625, and at the higher to \$2,650. But Platt's version is the more clear, consistent, and reasonable. Tisdel having been so much mistaken in this matter, we must, in the light of the other circumstances, conclude his evidence should not control.

Again, men who loan money on real security do not usually advance an amount fully equal to or greater than the value of the property pledged, especially where the borrower is insolvent, as Rising was in this case. This is strong evidence that plaintiff in error really became the purchaser, and this view is strongly supported by the other facts of the case.

Why should Rising, while occupying the property, have directed it to be assessed for taxation to plaintiff in error if he considered himself as the owner? Such an act is inconsistent with ownership. Nor is it usual for mortgagors to lease mortgaged premises from the mortgagee before a default has occurred. The fact that Rising took a lease from plaintiff in error is strong evidence that he regarded the transaction as a sale, with a privilege to repurchase at an advance. All of these facts support

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the theory that it was not a mortgage, and render it almost certain that it was an absolute sale.

Again, defendants in error in their answer to the cross-bill filed by plaintiff in error deny that he gave to them, or either of them, a bond for a reconveyance. From this denial, and from the fact that they had filed their bill claiming a homestead right in the premises, and out of which the cross-bill grew, it seems apparent that they were then repudiating the transaction as a mortgage, but insisting upon it as an absolute sale. From this answer, we must conclude that defendants in error were endeavoring to prevent the transaction from being treated as a mortgage, or why deny the existence of the bond, which is now regarded as the strongest evidence to stamp it a loan and security? It would hardly be equitable after such a denial to permit the bond to be asserted to establish the opposite of what was then denied to exist in fact.

If the parties understood and intended it to be a mortgage, it is strange that neither Platt nor Myers was informed of the fact, when they were active agents in accomplishing what was done. It is not reasonable to suppose that it could have been intended as a mortgage, and they not have known the fact. One of them made the conveyance and the other drew the papers when all of the parties were present, and their opportunities, it may be inferred, were ample to have known the fact, if it had been true. If intended as a mortgage, no possible reason could have existed for concealing the fact, but, on the contrary, it would seem but natural that Rising would have desired to have as large a number of witnesses of the fact as could have been readily procured.

As to the refusal to grant the relief in the first suit brought as to the homestead right, there was no error in the decree. Even if such a right existed when defendants in error were ejected from the premises, it was abandoned and lost by removing to and acquiring another home in Nebraska, where they had resided over two years, before asserting their claim. It can not be held under the statute that a party may, after acquiring a new home in another State, still rely upon the statute as

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though his former home had not been abandoned. The court below, therefore, did right in refusing to decree the claim to the homestead, which is affirmed, but erred in declaring the deed to be a mortgage, and for that reason and to that extent the decree must be reversed.

On the hearing of the second cause the record and decree in the former suit were read in evidence to support the bill, together with the former depositions, and the deposition of Tisdell again taken, and the deposition of Anson Rising. The deposition of plaintiff in error was also read in evidence. A large amount of evidence was also heard on the question of improvements and rents of the premises. Tisdell swears substantially to the same facts as on the former trial. Rising testifies that it was a loan at twenty-five per cent, and the deed was given as security; that plaintiff in error was to reconvey upon being paid \$2,800 within one year; that he sold plaintiff in error one and a half acres of the tract for \$300, which was applied to the interest, and a bond given for a reconveyance upon the payment of \$2,500 within one year from its date. Now, in this he is contradicted by the bond, which only requires the payment of \$2,401. Thus it is seen that he is mistaken or has sworn recklessly for the purpose of advancing his own interest. Again, plaintiff in error swears it was an absolute sale, and that he purchased the one and a half acres from Myers who held a bond for its conveyance, and for \$200 paid him, he assigned the agreement to plaintiff in error. He says he was to give \$2,500 for the property. That he paid Myers \$2,242.71 for defendants in error. Paid Myers \$200 for the acre and a half of the ground, and \$57.29 to defendants in error, which makes the sum he says he was to pay. In his statement of the first and last amounts he is corroborated by Platt, and is supported by him in the fact that money was paid to Myers outside of the sum paid for defendants in error, but they differ as to the amount of that payment. The additional proof heard in the second case fails to change the conclusion arrived at on the evidence heard on the first trial. Upon a careful examination of all the testimony in the case we are sat-

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ified that it fails to establish the fact as claimed that the deed was given as security in the nature of a mortgage, but on the contrary we are convinced that it was intended to be absolute. The decree in the former suit is modified as herein stated, and in the latter the decree is reversed, and the causes are remanded.

Decrees reversed.

SHELDON, J., having tried these cases in the court below, took no part in their decision.

JOHN DALE *et al.*

v.

ROBERT T. LINCOLN, Assignee, etc.

1. DEED—*delivery*.—A husband having enlisted in the United States army in February, 1862, executed to his wife, for the expressed consideration of one dollar, a deed of his real estate, for the purpose of enabling her to dispose of it for the benefit of herself and family in case he should not return from the service. He caused the same to be recorded. The wife never saw the deed until after his death, which took place in October, 1862. She found it in his papers, which he had left in her possession. She knew he had said he was going to make the deed. After his death the wife received the rents of the property, offered it for sale, and finally sold the same: *Held*, that the facts showed a delivery by the husband, and that the wife's assent to the transaction was clearly evidenced by her receipt of the rents and offering to sell the property.

2. SAME—*delivery and acceptance*.—To render a deed operative there must be a delivery and acceptance. No particular form or ceremony is necessary to constitute either, but there must be satisfactory evidence that the grantee has either actually accepted the deed, or has sought to become the beneficiary under it. It is well settled that a deed may operate by a presumed assent until a dissent appears.

3. DEED—*husband to wife—validity*.—A husband having enlisted in the army during the late civil war, by deed conveyed his whole real estate to his wife for the expressed consideration of one dollar, to enable the latter to dispose of the same for the benefit of herself and family in case of his

62	22
135	80
62	22
195	614
197	59
62	22
111a	504

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death. After his death the wife sold and conveyed the same for its full value, and the proceeds were applied toward the support of herself and family. The heirs of the husband after their majority executed their conveyance for the same premises, and their grantee brought ejectment against the party holding under the deed from the wife: *Held*, on bill filed to enjoin the suit at law, that the husband's deed to his wife was void at law, but would be upheld in a court of equity.

(LAWRENCE, C. J., WALKER and McALLISTER, J. J., dissenting.)

APPEAL from the Circuit Court of Kankakee County; the Hon. CHARLES H. WOOD, Judge, presiding.

Mr. STEPHEN R. MOORE, for the appellant.

Messrs. WILLIAMS & THOMPSON, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The points made by appellants on this record are: 1. Was the deed made by Charles M. Vaughan to his wife *Cecelia* during coverture, a good deed at law, and sufficient to pass the title? 2. Was there a delivery of the deed from Vaughan to his wife? 3. Was the deed sufficient in equity to pass the title?

The first question is answered and disposed of by the admissions in complainant's bill, wherein it is conceded that by the rules of the common law the deed from Vaughan to his wife was void, and that the legal title to the premises did not pass thereby, so as to enable his wife to convey the same to the Douglas Linen Company, represented by complainant.

As to the second question, Was there a delivery of the deed from Vaughan to his wife *Cecelia*, this is to be determined by the facts and circumstances of the case, and the legal inference to be drawn from them.

It appears the lots in question composed the bulk of the property of the grantor, Vaughan, who, having, in February, 1862, entered the army and about to take the field, on the twenty-second day of that month, executed a deed to his wife for the expressed consideration of one dollar for these lots, for the purpose that she might dispose of them as best she saw fit

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for the benefit of herself and family should he not return from the service. He was wounded, and died from the effects of the wound in October, 1862, before his term of service expired, and never returned. This was the testimony of Dr. Knott, the family physician, given without objection, though he was not present when the deed was executed, nor did he see it delivered. He further stated that he knew the purpose of the deed, first from Mr. Vaughan himself, and afterward from his wife about the time he made the deed. Mrs. Vaughan in her testimony states that she never saw the deed until after her husband's death—that she found it among his papers which had been in her possession all the time; that she knew her husband said he was going to make this deed; is not positive whether he said where it was; he said there were papers, but didn't know of his mentioning a deed particularly.

A further fact appears that Mrs. Vaughan received the rents of the property after the death of her husband, and authorized, verbally, Dr. Knott to effect a sale of it, giving him the deeds in her possession. Her agent did bargain the property to one Billings for a sum equal to its value, as the agent supposed, but Mrs. Vaughan would not carry out the contract.

There is no dispute between these parties that to render a deed operative there must be a delivery and acceptance, not that any particular form or ceremony is necessary to constitute either, but there must be satisfactory evidence that a grantee either actually accepted the deed or has sought to become the beneficiary under it, before any litigation has occurred involving the question of acceptance.

Mrs. Vaughan knew her husband intended to make a deed to her of this property, to do with it as she pleased for the benefit of her family; he referred her to the papers which had always been in her possession; and, with the deed in her possession, she offered the property for sale, and received the rents.

It is well settled, that a deed may operate by a presumed assent until a dissent appears, and then it becomes inoperative, on the principle that a person can not be made a grantee against his will and without his agreement. 4 Kent's Com., 447.

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It is very apparent that Vaughan had, for a good purpose, parted with all his right to this property and vested it in his wife, so far as he could do so. by the acts done. Placing it upon record, which it is inferrible he did, was notice to all where the title was, and that fact was *prima facie* evidence of a delivery, on the authority of *Himes vs. Keighblisher*, 14 Ill., 469, and the possession of the deed by Mrs. Vaughan from the day it came to her hands or the hands of her attorney, affords still further evidence of a delivery. *Canning vs. Pinkham*, 1 N. Hamp. 357; *Clark vs. Ray*, 1 Harris and Johnson, 323.

These are all presumptions, and appellants contend they are sufficiently rebutted by the fact, that the deed was found among the papers of the grantor after his death, up to which time, the grantee, Mrs. Vaughan, had not seen it. But when it is considered Mrs. Vaughan knew a deed was to be made to her, and the papers delivered to her, and which had been in her possession all the time, the inference is a fair one, when taken in connection with the fact that she received the rents of the property, and authorized an agent to sell it for her, that the deed had been delivered to her and accepted by her—her assent must be presumed until her dissent is shown. This, appellant's counsel contends has been shown by her declarations when negotiations favorable to the company were in progress, she then declaring, according to the testimony of some of the witnesses, that she had no title to the lots—that they belonged to the children. It will be assumed in this connection that she nowhere and at no time declared she had no title because the deed was not delivered to her, but upon the want of power in a husband to convey land by deed to his wife. This was the idea of her attorney, and this must be assumed as the ground of her belief. That she did assent to this deed is shown, we think, very satisfactorily by all the facts.

The remaining point is, will equity sustain this deed so as to pass the title to Mrs. Vaughan?

The books furnish many cases where deeds and bonds not being valid in law have been sustained in equity. So long ago

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as Lord Macclefield's time, it was held when a *feme sole* seized in fee of lands gave a bond to her intended husband, that in case of their marriage she would convey these lands to him and his heirs; that having married and the wife dying without issue and then the husband dying, that the bond, though void in law, yet was good evidence of the agreement in equity; and the heir of the husband could compel a specific performance against the heirs of the wife. The Lord Chancellor said, it would be unreasonable that the intermarriage, upon which alone the bond took effect, should itself be a destruction of the bond; that the foundation of the notion was, that in law the husband and wife being one person he could not, at law, sue his wife on this agreement; whereas, in equity, it is constant experience that the husband may sue the wife and the wife the husband; and he might sue her in this case upon this very agreement. *Cunneil v. Buckler*, 2 Willes, 249, (2 Eq. Cases abridged, 136.) We cite this case, and many others to the same effect could be referred to, as showing that a court of equity will sustain a contract void at law, and that the same reason is given in the case before us, why a deed from a husband to his wife is invalid; that is, that they are one person in law, as was given in the case cited.

It is no doubt true, as stated by Justice Story in his treatise on equity jurisprudence, that, in respect to gifts or grants of property by a husband to his wife after marriage, they are ordinarily, but not universally, void at law, yet courts of equity will uphold them in many cases, when it appears from the circumstances and nature of the gift or grant, whether it be expressed or implied, that they are such as to afford no ground to suspect fraud, and the same amounts only to a reasonable provision for the wife. Story's Eq. Juris. § 1,374.

We have examined the numerous authorities cited on both sides, and are satisfied with the views presented by Chancellor Kent in *Shepard v. Shepard*, 7 Johns. Ch. 57. In that case the husband, in consideration of love and affection, and to make a sure maintenance for his wife in case she should survive him, made to her an absolute deed of all his real estate during

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her widowhood. Entertaining the idea that this deed might be inoperative, he afterward made a deed of the same property to his son. After a full review of the authorities the chancellor held that the deed to the wife, in the light of the authorities, could be sustained, and decreed that she be put in possession of the premises, and all persons be enjoined from disturbing her.

The case of *Jones v. Obenshain*, 10 Grattan (Vir.), 259, was a deed, the only consideration for which was love and affection for his wife, conveying his whole estate to her to the disinherison of his heir-at-law, and fully sustains the view we have taken of this case—the deed to the wife being upheld against the claim of the heir-at-law. Other cases are cited to the same effect, and among them *Hunt v. Johnson*, 44 New York, sustaining the opinion of Chancellor Kent in *Shepard v. Shepard*, *supra*. It is true, in the deed in question, the consideration is expressed to be one dollar, but the paramount consideration was, as proved, that out of the property his wife and children should have some means of support, small as they might be, and, although it was the whole of his estate, it was but a small competence.

It is in proof the price paid for the property by the company was all it was worth, and that the money received for it has gone to the support of his wife and children, as the grantor intended it should go. A proper case is made out for the interposition of a court of equity to uphold this deed.

This case is relieved from all suspicion of fraud, though the whole estate was conveyed—itsself of small value—there being no creditors in the way, and that the justice of it demands the deed should be upheld we can not doubt. It would be inequitable and unjust, the property having sold for its value, and the proceeds gone to the support of the wife and children, that they should be restored to the land and the wife to her dower interest in it. We can not help believing, from the testimony in the cause, that the papers given by the husband to his wife, and the deed put on record by him, was equivalent to a delivery, and her assent to the transaction is

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clearly evidenced by the receipt of rents and offering to sell the property. She exercised the same control over it every owner exercises over his property ; and she believed it to be hers until an opportunity arrived when it was thought by disclaiming any right to it she and her children might derive a further benefit from it.

We are of opinion every consideration of right, justice, and equity requires that the decree of the Circuit Court should be affirmed, and it is accordingly affirmed.

LAWRENCE Ch. J., WALKER and McALLISTER, J. J., dissent.

JOHN FAHEY

v.

PRESIDENT AND TRUSTEES OF THE TOWN OF HARVARD.

1. MUNICIPAL CORPORATION—*liability for injury from excavation in street.*—Where a party without the consent of the authorities of an incorporated town, dug and left open a large pit in the street, along the sidewalk, in front of land owned by him, without any warning to passers-by, and while the same was so left exposed a person in the night-time, while exercising due care, fell into the pit and was injured : *Held*, that the town was not liable unless it had actual notice of the nuisance, or it had remained a sufficient time for notice to be implied.

2. NUISANCE—*case by town for damages paid for wrong of another—declaration.* Where a town, when sued by a person for an injury received from falling into a pit dug by a party in the street, in front of his premises, settled the claim of the injured party by payment of \$300 before any judgment, and without any notice to the party creating the nuisance, and then brought an action on the case against such party to recover the sum so paid, the declaration containing no allegation that the town had any notice of the nuisance, or statement of any facts from which notice might have been inferred or implied : *Held*, that the declaration was bad on general demurrer.

3. In such a case, before the town is entitled to recover of the wrongdoer the sum so paid, it must show by the pleadings and proof that the town was legally liable to the injured party.

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WRIT OF ERROR to the Circuit Court of McHenry County ;
the Hon. THEODORE D. MURPHY, Judge, presiding.

Defendants in error when sued by Lackner for the injury, before any trial was had, settled and compromised with him, and paid him \$300 and paid the costs of suit, amounting to \$43.05.

Mr. FRANK CROSBY, for the plaintiff in error.

Messrs. JOSLYN and SLAVIN, for the defendants in error.

PER CURIAM: This was a special action on the case brought by defendants in error against plaintiff in error to recover over of the latter, for a sum which the former had paid to one Lackner for damages sustained by him, by reason of having fallen into an excavation in the street made by plaintiff in error. The plaintiff in error, defendant below, demurred to the declaration. The court below overruled the demurrer, assessed damages, and gave judgment. The sufficiency of the declaration is the only question presented.

It appears, from the declaration, that defendants in error settled with Lackner before judgment and without any notice to plaintiff in error. In such case plaintiffs below would be required to show, by their declaration, and prove, that the town was legally liable to Lackner. The facts alleged show that it was the duty of the town to keep the streets in a safe condition, and that the street in question had been put in that condition ; but that the defendant, without the consent of the town, did, on the 1st day of September, 1869, wrongfully dig in and upon the front of land owned by him on said street, on the line of the sidewalk, a large pit, and suffered it to remain open during the day and night time without any warning to passers by, and so exposed, one Louis Lackner in the night time, while exercising due care, etc., fell into the pit and was injured. Under this state of facts, the town would not be liable unless it had actual notice of the nuisance, or it remained a sufficient time for notice to be implied. There is no allegation in the declaration that defendants in error had ac-

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tual notice of the nuisance, nor any facts from which notice might have been inferred or implied. As defendants in error would be required to prove these facts, they should have been alleged. And it is the opinion of a majority of the Court that the demurrer should have been sustained. The judgment is reversed, and the cause remanded.

Judgment reversed.

EDWARD W. MORRISON *et al.*

v.

MARY A. KING *et al.*

1. **EASEMENT**—*what is.* The disposition and arrangement of the several parts of an entire building consisting of several parts, for various uses, for ease and convenience, and with reference to ways, light, and mutual supports, made by the owner in fee during unity of seizin, which are apparent and continuous, and necessary to the reasonable enjoyment of the several parts of the building, will be easements upon severance of title as to the different parts of the building, on the principle that every grant of a thing naturally and necessarily imports a grant of it as it actually exists, in the absence of any thing showing a contrary intention.

2. **SAME**—*when and how passed.* Such easements, when continuous and apparent during the unity of seizin, upon severance, will pass to the several holders of the premises, unless the contrary is provided for; and each portion of the several premises will pass subject to all the burdens and advantages imposed or conferred by the former owner. The grantees will each take their respective portions as they existed in the hands of the former owner; and the same rule applies to a severance by judicial proceedings for assignment of dower.

3. **CONVEYANCE**—*what passes by.* Incorporeal hereditaments appendant or appurtenant to land, will pass by a conveyance of the land as an incident thereto. Thus, if a house or store be conveyed, every thing passes which belongs to, and is in use for it, as an incident or appurtenant, without the use of the word "appurtenances," by mere operation of law.

4. **ASSIGNMENT OF DOWER**—*what passes by.* When premises are assigned to a widow for dower, the assignment, like a deed, without mention of appurtenances, will pass all those things which are incidents appendant or appurtenant thereto; and, in the absence of any restrictions in the pro-

62 30
128 357

62 30
39a 557

62 30
144 641

62 30
42a 355

62 30
57a 662

62 30
60a 587

62 30
172 383
173 196

62 30
98a 1276

Syllabus. Opinion of the Court.

ceedings, it will be presumed that they were taken into consideration by the commissioners and regarded as a charge upon the other portion in favor of that allotted.

5. *EASEMENTS—injury to—injunction.* When the owner had so constructed and arranged a large building of three stories, consisting of many apartments, rooms, and offices, devoted to different uses, that certain stairways furnished the only access to the upper stories, and the stairways and halls were lighted by a skylight in the roof, and the same was so continuously used until after his death, when one end of the building, including one-half of the stairways, was assigned to his widow as her dower, and the other portion, including all the sky light, passed to devisees under his will, and the devisees proposed to tear down their part of the building, and erect another in its stead four stories high; not because of dilapidation, but because it was not of fine enough quality, the effect of which was practically to destroy access to the second story of the widow's portion, destroy all access to the third story, and the lights, and render the rest of the building unsafe by the removal of the necessary supports to the wall, and untenable, thereby causing great injury and damage: *Held*, that a decree on bill by the widow against the devisees, restraining them from their proposed action, under the circumstances of the case, was proper.

6. *EQUITY JURISDICTION.*—Where the owners of a part of an entire building propose to tear down their part thereof to the destruction or great injury of the rights of the owner for life of the remaining part of the building, consisting in certain easements established during the unity of seizin, it was held, that a court of equity had jurisdiction to entertain a bill to restrain the injurious act.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. S. K. Dow, for the appellants.

Messrs. HIGGINS, SWETT & QUIGG, and Mr. JOHN J. HERRICK, for the appellees.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

The appellee Mary A. King, was, before her marriage with her co-complainant in this cause, the widow of James M. Morrison, who died in 1868, seized of divers parcels of real estate, situate in the city of Chicago, among which were the land and building in question in this suit. This case

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was a bill in equity by said widow (her present husband being joined as co-complainant) against appellants, to restrain them from taking down, as they proposed to do, a portion of said building, of which another portion had been allotted to said widow as dower, by which allotment, as she claims, and as incidental thereto, she became entitled to certain easements, or rights in the nature of easements, attached to or charged upon the part of said building proposed to be taken down, and which rights would thereby be wrongfully disturbed or destroyed. On the hearing, upon pleadings and proofs, the court below found in her favor, and perpetually enjoined the interference; from which decree an appeal was taken to this court. The material facts are undisputed. In 1863 and 1864 the said James M. Morrison, being the owner of a plat of ground, situate upon the east side of South Clark Street, with a frontage of one hundred feet and two inches and a depth of eighty feet, constructed a brick building upon and covering the entire plat, but comprising, by its arrangement, five stores three stories in height, with basements. These stores were designated by numbers on the street, viz.: 151, 153, 155, 157, and 159 South Clark Street. The main or lower floors were used for retail stores, and the second and third floors for offices. Each store had a main entrance *from*, with show-windows *upon*, Clark Street, and was separated from the others by a brick wall, making the rooms about twenty feet wide, excepting the stores in Nos. 153 and 155, which were only about seventeen feet wide on account of the stairway; and all were about eighty feet in depth. The entrance from the street to the second story was a common entrance for the whole building, and by a stairway five feet wide, the centre of which was the twelve-inch wall between stores Nos. 153 and 155, so that two feet and a half in width, for the stairway, was taken from store No. 153, and the same width from No. 155.

When the second story was reached by this stairway, access to the offices in that story was had by means of a central hall running lengthwise of the building. From the head of said stairway and said central hall starts another, which afforded

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the only access to the third story. The last mentioned stairway was four feet in width, and comprising two sections, the first of which was located wholly upon No. 153, though at the line between that store and No. 155, and the other section was, in a similar way, placed wholly upon No. 155. This stairway conducted from the second story to the third, where there was also a central hall, like that in the second story. For the purpose of lighting the halls, stairways, etc., there was constructed a sky-light, four feet by six, in the roof, near said dividing line, yet wholly in the roof over No. 153.

Having completed the building in the manner stated, James M. Morrison remained the sole owner, leasing the stores and offices to divers tenants, who were in the use and enjoyment of these stairways, etc., under him, until the year 1868, when he died testate, leaving appellee, Mary A., his widow, who subsequently applied to the Superior Court, by petition, to recover her dower in the lands, etc., of which her husband died seized. The court adjudged that she should recover; appointed commissioners, who allotted and set off to her the buildings aforesaid, known as Nos. 155, 157, and 159, and the land on which they stood, describing the premises by metes and bounds according to the statute; by which description the centre of the wall dividing Nos. 153 and 155 was made the dividing line. The commissioners' report was approved by the court, and she took possession. After the assignment of the widow's dower and she had taken possession, the appellants, who held the legal title to Nos. 151 and 153, under the will of James M. Morrison, decided to take down their part of said building to within four inches of the dividing line between their part of it and the widow's; not because the walls were unsafe by reason of dilapidation, but to erect a first-class building, four stories high, with a basement, in the place of their two, which, as well as the widow's stores, they say, were only third-class.

The obvious and necessary result of carrying appellant's plan into effect, would have been the practical destruction of the way, the only means of access to the second and third stories of the stores of the dowress; because it would have in-

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volved the cutting away of one-half of the width of the lower stairway, thus reducing it to a stairway only two and a half feet in width. This would have been too narrow and inconvenient for persons to pass up and down, and would have entirely precluded the passage of furniture for offices to and from the second story and the street. The execution of the plan proposed would have entirely cut off access from the second to the third story, because it would have taken away the whole of the first section of the stairs. It would have totally removed the sky-light, and left the premises without any light from that source; would have deprived them of the necessary support from the part taken away, weakened the end wall, and jeopardized the safety of the building. Subjected to these perils, deprivations, and annoyances, her premises would, at once, have become deserted by her tenants, and not only so, but rendered actually untenable. And as to the upper stories, this condition would be permanent, unless she subjected herself to the loss and expense of restoring the lower stairway to its original width by taking enough for the purpose from the width of store 155. That being already but about seventeen feet wide, could not spare the space necessary without materially detracting from its rental value. When all this was done, the second story would be unavailable without a new sky-light, and the third story without new means of access, which could be supplied only with great difficulty and expense.

Appellant's counsel insists that, inasmuch as appellee Mary A. King, did not derive her estate from the original owner by *grant*, but took it by metes and bounds under the statute as an allotment for dower, she therefore took nothing by implication; took nothing one inch beyond the boundary line between her portion and No. 153, which line was the centre of the wall between Nos. 153 and 155 and the centre of the lower stairway. From this position he argues that appellants had the clear, legal right to take away any part of their building up to that line, including a portion of the division wall itself, and that, whatever of the alleged easements she could restore or sup-

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ply by reasonable labor and expense, she was bound to supply, or do without.

The position is supported neither by principle nor authority.

These arrangements for ease and convenience, such as ways, light, and support, were provided and used by the owner in fee during unity of seizin. They were apparent and continuous. No person of ordinary faculties, dealing with the premises, could fail to observe them. They were necessary to the reasonable enjoyment of the premises, comprising the three stores, in question. It is true, as claimed by counsel, that, while the whole premises remained in the testator, these arrangements for ways, light, support, etc., did not, in any technical sense, amount to easements. Until a severance and the premises were held by separate owners no question of that character need arise. The foundation of the doctrine of easement in this and similar classes of cases is a disposition and arrangement of the premises as to the uses of the different parts, by him having the unity of seizin, and then a severance. It being a general principle in relation to grants that every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for, it would seem to follow, that each portion of the severed premises should pass subject to all the burdens and advantages imposed or conferred by the proper owner. Such, certainly, is the tendency of the cases cited by appellees' counsel. *Coppy's Case*, 11 Hen., 7, 25, p. 1, 6; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Surry v. Pigott*, Poph. 166; *Robins v. Barnes*, Hob. 131; *Richards v. Rose*, 9 Exeq. 218; *Humphries v. Brogden*, 64 E. C. L. 744; *Pyer v. Carter*, 1 Hurl. & N. 916; *Eward v. Cockrane*, 4 McQueen, 117; *Glave v. Harding*, 3 Hurl. & N. 944; *Suffield v. Brown*, 33 L. J. Ch. 249.

Some of the American cases cited are: *New Ipswich Factory v. Bachelder*, 3 New Hamp. 190; *United States v. Appleton*, 1 Sumner, 492; *Eno v. Del. Veccheo*, 4 Duer, 53; S. C. 6 Duer, 17; *Webster v. Stevens*, 5 Duer, 553; *Hutemeier v. Albro*, 18 New York, 48; *Lampman v. Milks*, 21 N. Y. 505; *Seibert v. Levan*, 8 Penn. Stat. R. 383; *Kieffer v. Imhoff*, 26

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Ib. 438; *McCarty v. Kitchenman*, 47 Ib. 239; *Phillips v. Phillips*, 48 Ib. 178; *Hadden v. Shoutz*, 15 Ills. 581.

It has been deemed a needless task to present an analysis of these cases. These cases, and others, embody a current of authority, holding that an easement may be created by the disposition made of premises by the owner of the estate, and that, upon a severance of the title, the owners will take their respective shares as they existed in the hands of the former owner. *Seymour v. Lewis*, 2 Beaseley, 439. And we are of the opinion that it is not pushing the doctrine too far to apply it to a severance by judicial proceedings for assignment of dower. *Kelgour v. Ascham*, 5 Harris and J. 82, and *Burwell v. Hobson*, 12 Grat. 322, were cases where partition was made by commissioners, and the doctrine applied. There can exist no valid reason why easements should not pass as incident to an estate vested by legal proceedings, as in the cases of assignment of dower, and partition among heirs, as by a conveyance which makes no reference to appurtenances.

"In corporeal hereditaments *appendant* or *appurtenant* to land as common of piscary and of pasture *and right of way*, pass by a conveyance of the land to which they are annexed, without even mention of the appurtenances." Co. Litt. 121, b.

"Some things," says Kent, "will pass by the conveyance of land as incidents, appendant or appurtenant thereto. This is the case with the right of way or other easement appurtenant to land * * and if a house or store be conveyed every thing passes which belongs to, and is in use for it, as an incident or appurtenance." 4 Kent's Com. 467. So in *United States v. Appleton*, *supra*, Story J., said: "It is observable that in this case reliance is placed on the language 'with all the ways,' etc. But this is wholly unnecessary; for whatever are properly incidents and appurtenances of the grant, will pass without the word 'appurtenances,' by mere operation of law." The 25th section of the statute concerning dower, (R. S. 1845, p. 202,) provides that the commissioners shall

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make return, in writing, under their hands and seals to the court; "which, if approved by the said court, *shall vest in her* an estate in the lands and tenements so set off and allotted to her, for, and during her natural life; or if such estate shall have been set off and allotted to said widow by virtue of section 15, of this chapter, such estate shall be vested in her absolutely in fee simple, and of inheritance forever, subject to her absolute use, control, and disposition, as though her interest therein had been acquired by her when *sole*."

In this case the allotment was not made under the 15th section. But the return of the commissioners, in writing, under their hands and seals, with the approval of the court, vested in Mary A. King an estate in the lands and tenements so set off and allotted to her, for and during her natural life. Now, can it be successfully maintained, that in such a case, or one under the 15th section, the proceeding under the authority of the law, which has the effect in one case to vest the widow with a life estate, and in the other, with an absolute estate in fee simple, shall not have the effect to pass any of those things as incidents appendant and appurtenant to such lands and tenements, as would pass by a conveyance without mention of appurtenances? We think not. It seems to us to be a reasonable rule, consistent alike with justice and the analogies of the law, that where the severance of an estate consisting of two or more heritages occurs by reason of the death of the common owner, and the laws of descent and of dower, and an allotment of the latter is made under the statute, the dowress, in the absence of any restrictions in the proceedings, should be entitled to take the portion allotted to her as it existed at the time. If conveniences provided for such portion by the common owner were continuous and apparent, and necessary to the reasonable enjoyment of it, they will be presumed to have been taken into consideration by the commissioners, and regarded as a charge upon the other portion, in favor of that allotted, and as passing with the estate by operation of law.

We are of opinion that equity had jurisdiction, and that the

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case was properly disposed of by the court below, and its decree should be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* THE DECATUR AND STATE LINE RAIL-
WAY COMPANY

v.

JOSIAH McROBERTS, Judge, etc.

1. **EMINENT DOMAIN.** The 13th section of the Bill of Rights of the constitution of 1870, placing restrictions upon the exercise of the right of eminent domain, is not merely prospective in its effect, but operated *in presenti*, without legislative action.

2. **SAME—mode of fixing compensation.** It provides that private property shall not be taken or damaged for public use without just compensation; and that such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The requirement that the compensation shall be ascertained by a jury is affirmative in its character, and must imply an exclusion of any other mode of fixing the compensation. If there was no law under which a jury could be impaneled for the ascertainment of such compensation, and the legislature neglected to provide one, the constitution would not, for that reason, be in abeyance; but until such law was provided, the right of eminent domain could not be exercised.

3. The compensation for property damaged, as well as taken, must be ascertained by a jury. It can be neither damaged nor taken without compensation; and there can be no entrance upon or possession of land for public use until the compensation for the land damaged, as well as taken, has been paid.

4. **SAME—act of June 22, 1852.** The first six sections of the Act of June 22, 1852, which provides for the filing of a petition, due notice to the persons interested, the appointment of commissioners, their inspection of the premises, and a report of the compensation assessed by them to be filed with the clerk of the Circuit Court, are in no sense in conflict with the constitution of 1870.

5. But the 7th section, which makes the decision of the commissioners conclusive upon the parties before they can have the benefit of a trial by jury, is inconsistent with the letter of the constitution. The assessment and report of the commissioners should conclude no owner of the land, and confer no right upon the corporation, unless the land owner assents, by an acceptance of the compensation, or in some other manner.

62	38
124	664
62	38
31a	383
62	38
194	1318

Syllabus. Statement of the case.

6. So section 9, which requires the execution of a bond upon taking an appeal from the decision of the commissioners to the Circuit Court, is clearly annulled by the new constitution.

7. And section 12, which permits the land to be entered upon during the pendency of the appeal, is manifestly inconsistent with the Bill of Rights.

8. But there is enough of the act which is not inconsistent with the constitution to enable private property to be taken for public use. The commissioners may act, and, after notice of the filing of their report, parties may bring the proceedings before the Circuit Court, as provided in sections 10 and 11 of the act. If satisfied with the report, and the compensation fixed, the latter may be accepted, and then an adjustment can be made by those who are competent to act. If the report is not satisfactory, then notice should be given to the opposite party, as provided in the sections referred to, so that a trial can be had in the Circuit Court.

9. But the party whose land is sought to be taken ought not to be compelled to pay costs if the assessment of the commissioners should be affirmed or not increased.

10. In this case a peremptory mandamus was awarded, requiring the Circuit Court to appoint the commissioners, as provided by the Act of 1852.

11. Mr. JUSTICE BREESE, dissenting, holds that the Act of 1852 is so far inconsistent with the constitution that private property can not be taken for public use under it, and that the peremptory writ should have been denied.

The Decatur and State Line Railway Company was incorporated under a special charter granted by the Legislature of the State of Illinois on the 24th day of March, A. D. 1869. By the terms of this charter the company was authorized to condemn lands for right of way "in the manner provided by the general laws of this State."

On the 30th day of September, A. D. 1871, the relator applied to the Hon. Josiah McRoberts, presiding judge of the Circuit Court of Will County, for the appointment of commissioners, under the Act of 1852, to appraise certain lands in said county required by relator for right of way.

The regularity of the petition and notices was admitted, but the judge refused to appoint the commissioners.

An alternative writ of mandamus was sued out of this court, to which return has been made by the judge, admitting the facts alleged in the writ, and assigning as a reason for refusing to appoint the commissioners, that the constitution of 1870 had,

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in his opinion, repealed the right of way act of 1852. Motions were duly entered by the relator to quash the return, and that the peremptory writ should issue.

The question arises upon the sufficiency of the return.

Mr. GEORGE C. CAMPBELL, for the relator.

Mr. G. D. A. PARKS, for the respondent.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

An alternative writ of mandamus was awarded by this Court, requiring the presiding judge of the Circuit Court of Will County, to show cause why he refused to appoint commissioners to fix the compensation to be made to parties for the right of way over their lands; and to assess damages in accordance with the laws of the State.

The return of the respondent, and the argument submitted, contend that the law of June 22d, 1852, providing for the condemnation of land, by virtue of the exercise of the right of eminent domain, has become a nullity, by the adoption of the present constitution.

The following is the constitutional provision, which is assumed to be inconsistent with the act of 1852:

“Private property shall not be taken or damaged for public use, without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land, taken for railroad tracks, without consent of the owner thereof, shall remain in such owners, subject to the use for which it is taken.” Sec. 13 of Bill of Rights.

A constitution must be expounded in its plain and obvious meaning. It is an instrument, the truest exposition of which is that which best harmonizes with its design and object.

As has been said by Judge Story :

“Constitutions are of a practical nature, founded on the common business of life, designed for common use, and fitted for common understandings. The people make them, the peo-

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ple adopt them, and the people must be supposed to read them with the help of common sense."

Is the section of the Bill of Rights prospective in its effect, and inoperative without legislative action? The right of property, thus intended to be secured, can not depend upon the mere will of the legislature. The prime object of a Bill of Rights is, to place the life, liberty, and property of the citizen beyond the control of legislation, and to prevent either legislatures or courts from any interference with or deprivation of the rights therein declared and guaranteed, except upon certain conditions. It would be the merest delusion to declare a subsisting right as essential to the acquisition and protection of property, and make its enjoyment dependent upon legislative will or judicial interpretation. Such absurdity can not be ascribed to the framers of the instrument. Neither can the constitution be regarded as a plaything; to be made the sport of any department of the government; to be annulled by non-action, or to be operative at the mere pleasure of those who are bound to obey and respect it; but it is a solemn instrument emanating from the people, declaratory of rights and restraining in its operation, and which can only be abrogated by the sovereignty which created it.

The intention of the instrument must prevail; and in its ascertainment we must look at the consequences of a particular construction. If a literal meaning involve a manifest absurdity it should never be adopted.

Was it the design to leave the determination of the necessity of a jury wholly to legislative discretion? If so, the section is not only unnecessary, but absurd; for the former constitution did not make a jury indispensable; and the act of 1852 provided for the appointment of three commissioners to assess damages upon proceedings to condemn land, with the right of appeal, upon the execution of a bond, and a trial by jury in the circuit court; and this legislation had been sustained by the courts.

The present constitution differs from the constitution of 1848,

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in the requirement that the compensation shall be ascertained by a jury. It evidently was intended to provide a different mode, and to require that a jury shall act before private property shall be, in any respect, endangered. There must have been an object in the additional restriction. It is affirmative in its character, and must imply an exclusion of any other mode. If there is no law upon the subject, and the legislature neglects to provide one, the constitution can not be in abeyance. This would defeat the object, and make the limitation operative or nugatory at the pleasure of the legislature.

Suppose that the words, "as shall be prescribed by law," had been omitted in the section, no one would doubt for a moment that the section went into effect *in presenti*; and that, until the enactment of a proper law, if there was none, the right of eminent domain could not be exercised. It would have been the duty of the legislature, then as well as now, to provide for the empaneling of a jury, and the machinery necessary to make the section effectual. Private property was protected, and its inviolability secured from damage or seizure until the ascertainment, by a jury, of just compensation, and its payment. The inhibition of any other mode of determining the compensation is independent of, and complete without the words quoted. They merely declare the duty of the legislature.

As was said by the counsel for the respondents :

"Condemnation is forbidden without just compensation ; just compensation can not be made without ascertainment, and ascertainment is impossible except by a jury."

He also happily illustrates the sense of the section under consideration, by other sections of the same article.

Section 12 prohibits imprisonment of a debtor, unless upon refusal to deliver up his estate, "as shall be prescribed by law." Does the freedom of the citizen from incarceration, therefore, depend upon the action of the legislature? We apprehend not. He is secure from imprisonment for debt except

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upon a refusal to surrender his estate for the benefit of his creditors, or there is strong presumption of fraud; and until the manner of surrender is provided by law.

Section 16 forbids the quartering of troops in the house of the citizen, even in time of war, "except in the manner prescribed by law." The failure to prescribe the manner can not destroy the prohibition.

This right to take private property for public use is a high prerogative of sovereignty, controlled by the constitution, and can be exercised only subject to the Bill of Rights, and the limitations therein contained.

The section under consideration differs from the late constitution in another respect. It declares that private property shall not be taken or *damaged* for public use, without compensation. The word "damaged" is peculiar to the present constitution. We shall not undertake to determine the meaning and effect of this additional word, in all the phases in which it might be viewed, but only with reference to the proceedings before us.

When land is taken for public use, there is an appropriation of it; the owner is deprived of the use and enjoyment; and the control and possession are transferred to the corporation. The fee only remains in the owner, subject to the use for which the land is taken. The damage, if to the land which may be taken, must precede the actual taking; if to contiguous lands, it would be consequent upon the taking.

The compensation for property damaged as well as taken, must be ascertained by a jury. It can be neither damaged nor taken without compensation; and it follows, as a necessary sequence, that there can be no entrance upon, or possession of, land for public use, until the compensation for the land damaged, as well as taken, has been paid.

The important question remains, whether the law of 1852 is so far inconsistent with the constitution as to render the former inoperative?

The first section of the schedule provides, "That all laws in force at the adoption of this constitution, not inconsistent

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therewith, . . . shall continue to be as valid as if this constitution had not been adopted."

From the view we have taken of the constitutional guaranties, the conclusion is inevitable that the owner of land proposed to be condemned, must not be deprived of a regular trial by jury. He must not be fettered by any provision of law, which may deprive him of a fair and speedy trial, or which may prejudice his rights, before a submission of them to a jury. His land must not be taken or damaged without his consent, until the compensation has been fixed and paid.

The first six sections of the Act of June 22d, 1852, are, in no sense, in conflict with the constitution. They provide for filing a petition; due notice to the persons interested; the appointment of commissioners; their inspection of the premises; and a report of the compensation assessed by them, to be filed with the clerk of the circuit court.

Section 7, which makes the decisions of the commissioners conclusive upon the parties, before they can have the benefit of a trial by jury, is inconsistent with the letter of the constitution. The assessments and reports of the commissioners should conclude no owner of the land, and confer no right upon the corporation, unless the land owner assents—by an acceptance of the compensation, or in some other manner.

The requirement of the execution of an appeal bond, by the party who may desire to appeal from the estimates or decisions of the commissioners, is also a serious obstacle to a trial by jury. No hinderance, however slight, should be interposed to the enjoyment of this right. A non-resident land owner might be deprived of his right to bring the proceedings before the circuit court, and submit them to a jury, if required to give bond. The party, whose land is sought to be taken, ought not to be compelled to pay costs, if the assessment of the commissioners should be affirmed or not increased. Section 9, providing for the bond, is clearly annulled by the constitution.

Section 12, which permits the land to be entered upon, during the pendency of the appeal, is manifestly inconsistent with the Bill of Rights.

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It is not unreasonable that parties, after notice of the filing of the report of the commissioners, should bring the proceedings before the circuit court, as provided in sections 10 and 11. If satisfied with the report and the compensation fixed, the latter may be accepted, and thus an adjustment can be made by those who are competent to act. If the report is not satisfactory, then notice should be given to the opposite party, as provided in the sections referred to, so that a trial can be had in the circuit court.

There is enough of the act, which is not inconsistent with the constitution, to enable private property to be taken for public use. The filing of the petition, the full notice required of the application to appoint commissioners; their appointment and subsequent inspection of the property; the making an assessment; filing a report, and giving notice thereof, are merely initiatory of the proceeding for condemnation. Their action concludes the rights of no person without his consent. The trial by jury follows, without any unreasonable delay, and without any hinderance.

But until the ascertainment of the compensation, by a jury, if either party desire one, and the payment thereof, no right is acquired to enter upon, use, or apply the land for the purposes in the petition indicated. The land can neither be *damaged* nor taken until full compliance with the constitution.

The corporation may be delayed in the prosecution of the enterprise contemplated; but such delay is not so serious as a construction which would fritter away the constitution and jeopardize private property.

When it is declared that private property shall not be damaged for public use, without just compensation, to be ascertained by a jury, it is meant to secure it from intrusion until the conditions of possession are fulfilled. The property must be regarded as sacred and inviolable until there is a full compliance with the obvious sense of the constitution.

Subject to the views expressed in this opinion, the commissioners may rightfully act; and we are of opinion that a peremptory *mandamus* should be awarded for their appointment.

Dissenting opinion : BREESE, J. Syllabus.

It is, therefore, ordered that the peremptory writ issue.

Mandamus awarded.

SHELDON, J. I concur in the conclusion that a writ of *mandamus* should issue in this case, but do not concur in all the views expressed in the opinion of the majority of the Court in arriving at such conclusion.

Mr. JUSTICE BREESE, dissenting :

I do not concur either in the argument or conclusions of this opinion. It seems to me the act of 1852, in its most important features, is repugnant to the constitution of 1870. Section 13 of Article II, declares, in language the most emphatic, "that private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, or shall be prescribed by law. The fee of the land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."

The act in question authorizes the commissioners to enter upon the land of the owner without his consent, and in defiance of him, and tread down and destroy the grass, herbage, and crops that may be growing upon the line they may be examining which the road shall occupy. This entry is a trespass, and is attended with damages, small, it may be, but, nevertheless, the property is "damaged," and in a mode not permitted by the constitution. The amount of the damage is not the point. It is sufficient to show that the act is, in this particular, repugnant to the constitution. The inviolability of a man's possession, which this clause in the Bill of Rights was intended to preserve, is disregarded. This can not be permitted without the sanction of a jury, and this, the only safeguard the people have, is taken from them by this decision of the Court.

It was the evident intention of the framers of this article, and of the people in ratifying it, that a land owner should not be disturbed in the enjoyment of his property, or damage done

Dissenting opinion: Breese, J.

to it, by which the public was to be benefited, save by the verdict of a jury giving him just compensation.

But it is said a trial by jury is provided by the act. The land owner can appeal to the circuit court. I can not believe it was the intention of this article, that the owner of land, whose property is sought to be taken from him against his will, should, in order to a trial by jury, be put to the trouble and expense of an appeal. But while the appeal is pending, the company are in possession, doing damage more or less.

In another respect the act of 1852 is inconsistent with this article. By the act the fee in the land is in the company effecting its condemnation. The article vests the use only.

In my judgment, it was the intention of the convention to overthrow all previous systems in force for the condemnation of land for public use, and they supposed they had done so by the article in question.

It was their intention also that it should go into effect immediately and not await the action of the legislature, who might never act, and thus, by non-action, render this most valuable provision a dead letter.

I have not time to enter extensively into the argument. I give my conclusions after great deliberation, and am not convinced of my error by the opinion filed. If, as is therein stated, the report of the commissioners amounts to nothing, why, it may be asked, should the circuit judge of Will County be compelled, by mandamus, to appoint them? I am of opinion the mandamus was properly refused.

HERVEY LOWE

v.

GODFREY MASSEY.

62 47
101a 591
101a 592

1. TRESPASS FOR CRIMINAL CONVERSATION—*what participation by the husband in the guilt of the wife will bar the action.* In an action of trespass for

Syllabus. Opinion of the Court.

criminal conversation by the defendant with the wife of the plaintiff, an instruction which directed the jury that, even if they believed, from the evidence, that the wife of the plaintiff was ever so profligate, that would be no bar to his recovery, unless they further believed, from the evidence, that she was permitted to live as a prostitute, with the knowledge and consent of her husband, was regarded as erroneous, in that it required the participation of the husband in the misconduct of the wife to too great an extent in order to make it constitute a defense to the action, the connivance of the husband being enough to bar the action.

2. INSTRUCTIONS—*should be framed in view of the evidence.* And in view of the evidence tending to show the connivance of the plaintiff, it was held that to an instruction directing the jury that, in case they found the defendant guilty of the charges laid in the declaration, they were authorized to find for the plaintiff, should have been added the qualification, if there was not connivance on the part of the plaintiff.

3. INTENDMENT—*against a party failing to testify for himself.* No intendment should be made against a party because he does not testify for himself.

APPEAL from the Circuit Court of Will County ; the Hon. JOSIAH McROBERTS, Judge, presiding.

Messrs. RANDALL & FULLER, for the appellant.

Messrs. BRECKENRIDGE & MUNN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was an action of trespass for criminal conversation.

On the trial of the cause the following instructions were given on behalf of the plaintiff, to-wit :

The Court instructs the jury that in this case the law is, that even if the jury believe, from the evidence, that the wife of the plaintiff was ever so profligate, yet that would be no bar to his recovery in this case, unless the jury further believe, from the evidence, that she was permitted to live as a prostitute, with the knowledge and consent of her husband.

If the jury shall, from the evidence in the case, find that the defendant is guilty of the charges in said plaintiff's declaration alleged, they are authorized by law to find a verdict for

Opinion of the Court.

the plaintiff for such amount as they may think he ought to have, not exceeding the amount claimed in the declaration.

The jury are further instructed, that if a party to a suit is in possession of evidence at the trial and does not produce it, the inference of the law is that if produced it would be in favor of the opposite party, and against the party not using the evidence.

The first instruction we deem erroneous in requiring the participation of the husband in the misconduct of the wife to too great an extent in order to make it constitute a defense to the action. It is not necessary for that purpose that his conduct should go to the debased extent implied by that instruction. The connivance of the husband is enough to bar the action, which, as we conceive, comes much short of the requirement of the instruction.

In view of the evidence there was in the case, tending to show the connivance of the plaintiff, we think there should have been added the qualification to the second instruction, that there was not connivance on the part of the plaintiff.

The third instruction has no applicability to any thing in the case, except the fact that the defendant did not become a witness in his own behalf. From this fact no inference of law should arise, one way or the other. The adverse party might have introduced him as a witness, and as well might his failure to do so be held to imply a consciousness that the testimony, if offered, would be unfavorable to him.

No intendment should be made against a party because he does not testify for himself. We can readily imagine various motives which might influence a party to forego becoming a witness in his own behalf, besides the consciousness that the facts within his knowledge, if disclosed, would make against his own side of the case and in favor of that of his adversary.

We should be unwilling to adopt a rule which would have the effect to compel parties in a suit to become witnesses in order to avoid unfavorable legal inferences against them. It is not desirable to increase the frequency of the introduction of

Opinion of the Court. Syllabus. Statement of the case.

this species of evidence, and the lamentable exhibitions of contradictory testimony to which it now every day gives rise in our courts of justice.

As applicable to the facts of this case, we hold the last instruction to be erroneous.

For error in giving the above instructions, the judgment must be reversed, and the cause remanded.

Judgment reversed.

MARTIN A. HOWELL, JR., *et al.*

v.

THE ALBANY CITY INSURANCE COMPANY.*

1. *PRACTICE—declaration before second term—dismissal.* Where the plaintiff's summons was made returnable to the November term, 1870, of the Circuit Court, which was, in fact, served within ten days before that term, but no indorsement of service was made until Feb. 7 following, the commencement of the second term after suit brought, and the court dismissed the suit on motion of the defendant because no declaration had been filed ten days before the second term: *Held*, that the dismissal was proper.

2. *RETURN OF SHERIFF—after expiration of office.* A sheriff after the expiration of his term of office may amend or make a return of service of process duly performed by him while in office, when the service is recent.

APPEAL from the Circuit Court of LaSalle County; the Hon. EDWIN S. LELAND, Judge, presiding.

These several suits were brought by appellants in the Circuit Court of LaSalle County. The summons in each of the cases bore *teste* Oct. 1, 1870, and were returnable the first day of the next November term, held on the first Monday in November, 1870, or Nov. 7. Service was had on the 28th and 29th days of October. The remaining facts bearing upon the questions decided appear in the opinion.

* Eleven other cases brought by the same appellants against various companies, are embraced in this opinion.

62	50
143	345
62	50
163	545
60a	346

Opinion of the Court.

Messrs. RICE & BICKFORD, for the appellant.

Messrs. DICKEY & BOYLE, for the appellees.

Per CURIAM: The same question is presented in all the foregoing cases.

Appellants commenced their several suits against the insurance companies, and had summons issued in each case, returnable to the November term, 1870.

The cases were then in court; and though the record is silent as to what was done at the November term, the presumption is, from the subsequent proceedings, that they were continued by operation of law until the ensuing term.

The next term after the term to which the summons was made returnable, was held on the 7th day of February, 1871. No declaration was filed, either at the November term, or ten days before the February term.

Process was duly served upon appellees on the 28th and 29th of October, but the indorsement of service was not made until the 7th of February, at which time the term of the officer who performed the service had expired.

At the February term, a motion was made on behalf of appellees, to dismiss the respective suits; and appellants made a cross-motion to quash the return of service.

Section 11, of the Practice Act, provides: that if the plaintiff shall not file a declaration "ten days before the court at which the summons is made returnable," the court, on motion, shall continue the cause at the cost of the plaintiff; and it further provides: "if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a non suit."

When the above motions were made, no declaration had been filed in either of the cases.

Under the facts, it was the manifest duty of appellants to file their declarations ten days before the February term. Such is the fair construction and plain requirement of the statute. Their omission to do so, by operation of law, must result in a judgment against them. They knew the term at which the

Opinion of the Court. Syllabus.

summons was made returnable, and should have guarded against the consequences of their negligence.

There was no error, therefore, in the dismissal of the suits.

The court also acted rightly in not quashing the return of the officer. The duty was performed—the service was in fact made—while he was sheriff. The return is merely the evidence of service. The service is the act; the return is the proof of it.

After the expiration of the term, an officer may amend or make a return of service, which had been duly performed while in office, when the service has been so recent as in this case. To this there can be no possible objection. A contrary rule might work serious injury.

The judgment of the court in the several cases is affirmed.

Judgments affirmed.

MARENUS P. STULL *et al.*

v.

CHARLES H. HANCE.

1. **CONTRACT—construction.** In construing contracts and written agreements, the whole context should be considered, and the intention of the parties ascertained from it, and not from extrinsic evidence.

2. **SAME—whether joint contractor or surety.** Where a contract for the building of a house described A as principal, and B and C as sureties, who were not again named in the instrument, and in fixing the terms and conditions, reference was made to the party of the first part, and to the party of the second part, without naming the persons; and in referring to the party of the first part, the singular pronouns “he” and “him” were used, and the principal signed first with the other two under his name at the usual place, and the word “contractors” was written opposite their names: *Held*, that A was the contractor, and that B and C were only sureties; and that the word “contractors,” after their names, should not control the manifest intention of the parties appearing in the body of the contract.

3. Had the word “as” not been employed, there might have been some plausibility in urging that the word “sureties” was only descriptive of the

62	52
22a	42
62	52
133	551
62	52
99a	*852

Syllabus. Opinion of the Court.

person. But when the parties are described "as sureties," this renders their character of sureties clear beyond doubt.

4. **CONTRACT OF SURETY**—*strictly construed*. The contract of a surety is strictly construed, and his liability is never extended beyond the terms of his agreement, or at least its manifest purport. In case of doubt, the doubt is generally, if not universally, solved in his favor.

5. Where A undertook to build a school house, and entered into a written agreement therefor to the school directors, with B and C as sureties for his performance, and A employed the plaintiff to assist him in the work, B and C having nothing whatever to do in the hiring or prosecution of the work, and after the completion of the work, plaintiff settled with A, when there was found to be due the plaintiff \$59.50 for work, and \$25 for money loaned to pay other hands employed on the work: *Held*, that B and C were not liable to the plaintiff for the sums found to be due him, as they were not joint contractors with A.

6. **EVIDENCE**. In such case it was error to refuse to permit B to testify that he and C had nothing to do with the hiring of the plaintiff or any other workmen on the house, and that they did not authorize A to employ plaintiff or any other person, and that they had no interest in the contract except as sureties for A. While such proof was perhaps not necessary, yet it was proper as tending to show they were not liable.

APPEAL from the Circuit Court of McHenry County; the Hon. THEODORE D. MURPHY, Judge, presiding.

The opinion of the Court contains a sufficient statement of the case.

Messrs. JOSLYN & SLAVIN, for the appellants.

Mr. A. B. COON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit originally brought by appellee before a justice of the peace against appellants, to recover for money loaned and work and labor performed. A trial was had before the justice, resulting in a judgment against appellants, whereupon they removed the case to the circuit court, where a trial was had with a similar result; and the record is brought to this court on appeal and a reversal asked on several grounds.

The testimony shows that appellee was employed by Marenus

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P. Stull to work as a carpenter in the erection of a school house on the first of August, 1868, and he worked until July, 1869. He testifies that, being fearful that Stull, by whom he was employed, would not pay him, he quit work on the first of April, 1869, and informed one of the school directors of the fact, who told him to go on and work as before, and get all the pay he could and the district would pay the balance. He went to work, as before, under Stull, who superintended the work. After it was completed he had a settlement with Stull, and he testifies there was due him for work \$59.50, and \$25 for money loaned Stull with which to pay the hands at work on the school house. He also testifies that he looked alone to M. P. Stull for payment, who had employed him, until he quit and went again to work; that the other appellants had nothing whatever to do with hiring him, nor did he look to them for payment, as he did not know they had any thing to do with building the house; that he then knew that they were responsible. On this evidence, alone, no one would suppose that they were liable.

But it is sought to charge them by reason of an agreement entered into by M. P. Stull to erect the school house, and which they executed with him. The agreement describes M. P. Stull as principal and the others as sureties, and they are no more named in the body of the contract. In fixing the terms and conditions of the agreement, the instrument refers to the party of the first part and to the party of the second part, without naming the persons. But it is manifest that the parties only intended to treat M. P. Stull as the contractor, because they in several places in the agreement refer to the party of the first part, and in doing so use the singular pronouns "he" and "him." The contract by its terms treats M. P. Stull, in clear and unmistakable terms, as the contractor, and has no reference to the other appellants except as sureties. Again, they are described as sureties. This designates their relation to the contract in clear and unmistakable terms. It renders their character of sureties clear beyond doubt. Had the word "as" not been employed, then there might have been some plausibility

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in urging that the word surety was only descriptive of the person. But to so hold would be to do violence to the language employed. But it is urged that the manner in which they signed the agreement has fixed their character to be that of joint and several contractors. The names are signed at the usual place and each under another, but there is drawn to the right hand of the signatures a vertical line and the word "contractors" is written to the right of it.

In construing contracts and written agreements, the whole context should be considered, and the intention of the parties ascertained from it, and not from extrinsic evidence. When thus considered, it is manifest from this agreement that appellants only intended to become guarantors for the performance of the contract by their principal, who was evidently the contractor.

The mere fact that the word "contractors" was written opposite their names should not control the manifest intention of the parties which appears from the body of the instrument. But even admit they were contractors, what was the contract? M. P. Stull contracted with the directors that he would erect the house, and the other appellants contracted with them that he should, and, failing to do so, they would make good the damages the directors might sustain. To this and only this extent did they contract, and for that purpose and in that sense were they contractors, and not that they would build the house jointly with M. P. Stull, or severally, independently of his action.

Again, the contract of a surety is strictly construed, and his liability is never extended beyond the terms of his agreement, or, at least, its manifest purport. In case of doubt, the doubt is generally, if not universally, solved in his favor; and in this case, neither by the terms or purport of this agreement, are the appellants contractors for building the house, as partners or joint undertakers for its construction, but they are simply collateral contractors for the performance of the agreement of their principal.

In this view of the case, it was proper that Leffler Stull

Opinion of the Court. Syllabus.

should have been permitted to testify that he and his co-appellant had nothing to do with hiring appellee, or any other workman, on the house, and that they nor either of them authorized M. P. Stull to employ appellee or any other person, or that they had any interest in the contract beyond their liability as sureties. They had a right to prove that they had no interest in the contract entered into independent of the agreement. It may be that such evidence was not absolutely necessary, but it tended to prove that they were not in anywise liable, and hence was pertinent to the issue, and it should have been admitted.

From what has been said, it is apparent that appellee's instruction was erroneous. It informed the jury that appellants, as a matter of law, by the terms of the contract, were joint builders and contractors. This, we have seen, is not the true construction of the agreement. For the errors indicated the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

FREDERICK HARBERS *et al.*

v.

JOHN TRIBBY.

1. *CONTRACT—procuring enlistment—construction.* Where a party was employed to procure enlistments in the military service of the United States for the benefit of a town, so as to exempt it from draft in the late civil war, and the party so enlisting was to receive \$400 for each man so enlisted, and credited to the town before the day of the draft: *Held*, that the plaintiff, to recover under such contract, must not only show that he procured an enlistment, but, also, that the same was credited to the town before the day set for the draft, by competent proof.

2. *EVIDENCE—certificates of army officers.* In an action to recover a stipulated compensation for an enlistment for the benefit of a certain town, the plaintiff read in evidence, against defendant's objection, the certificate, not attested by any seal of office, of an enlisting officer of the United States, and a certificate of the acting assistant provost-marshal for the State of

Syllabus. Opinion of the Court.

Illinois, without official seal, to show the fact of enlistment to the credit of the town: *Held*, that there was no law making such certificates evidence in the courts of this State in controversies between its citizens.

3. EVIDENCE—*official character*. In such a case the fact that a person is an officer of the United States army, with power to give certificates of enlistment, can not be shown by proof that he acted as such. A certificate under the seal of the war department is the best evidence of his official character and authority.

WRIT OF ERROR to the Circuit Court of Woodford County; the Hon. S. L. RICHMOND, Judge, presiding.

Messrs. BURNS, CASSEL & PUTERBAUGH, for the plaintiffs in error.

Messrs. BANGS & SHAW, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit in the Woodford Circuit Court, on an alleged promise by defendants, to pay plaintiff \$400 for each man he should procure to be enlisted, and credited to the town of Lynn, when the credit should be given, so as to exempt that town from a draft for the quota thereof, under the proclamation of the President of the United States calling for 300,000 men. The defendants were subject to this draft, and were desirous of avoiding it in the manner alleged. The declaration contains, also, the common counts for work and labor, etc., but the cause was tried on the special count, resulting in a verdict and judgment for the plaintiff for \$532.37, being the \$400 claimed, and interest thereon at six per cent per annum.

To reverse this judgment the defendants bring the record here by writ of error, and have assigned various errors, the most important of which is, admitting improper evidence.

The plaintiff, to sustain the issue on his part, introduced in evidence, against the objection of defendants, the certificate of a person signing himself Lieut. Col. Lowe, purporting to be a certificate of enlistment; and the plaintiff testified that he was a regular enlisting officer of the United States, at Cairo. He also introduced in evidence, against the objection of the de-

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feudants, a certificate signed "James Oakes, Brev't. Brig. Gen. and A. A. P. M. G., Ill.," dated August 11, 1865, addressed to Messrs. Grover, Ayers & Son, Springfield, Ill., certifying that James Wilson, colored, of a certain height, "enlisted, January 25, 1865, at Paducah, Ky., by Lieut. D. McIvor, 122d Infantry, Ill. Volunteers, A. C. M., dist. West Kentucky," and that he had been credited on the records of his office to the town of Lynn, county of Woodford, State of Illinois, sub-district 50, in eighth congressional district. He also proved, by N. Bateman, the execution of this certificate by Oakes, and that he was, at its date, "acting assistant provost-marshal general" of Illinois, but was not provost-marshal of the eighth district of Illinois. Capt. Isaac Keys was provost-marshal of the eighth district. Witness also said the credit of enlistment made by Oakes, should have appeared on the books of the district marshal. Reports to districts were not regularly made to district marshals, but transcripts were furnished from his books when requested.

We are not advised of any law making these certificates evidence in the courts of this State, in controversies between its citizens. We have a statute, long since enacted, and of frequent application, making the official certificates of registers and receivers of the several land offices of the United States evidence in our courts, of certain facts. The certificate of no other officials of the Federal government are such, unless, of certain officers attested under their seal of office.

There is no evidence that Lowe was an officer of the United States army, and competent, from his position, to give such a certificate. His official character is not evidenced by his acts, for it is notorious, that during the late conflict between the States, official power was assumed in many cases. A certificate, under the seal of the war department, would be the best evidence of his official character and authority. The same may be said of Oakes' certificate; and, in addition, it may be said of that, it appears to be a mere private matter, intended for the benefit of Grover, Ayers & Co., of Springfield, to whom it was addressed. And beside all this, neither certificate shows

Opinion of the Court. Syllabus.

the man was, in fact, credited to the town of Lynn; and there is nothing in the record to show he was so credited prior to February 14, on which day the draft was to take place. The sense and meaning of the contract between these parties is, that plaintiff was not only to procure the men, but to see they were credited to the town of Lynn. If they were not so credited, the object of his employment would not have been attained. In examining the whole evidence, we are constrained to believe the agreement of the parties was, that plaintiff, for every man he procured, should produce the certificate of the provost-marshal of the eighth district, through whom, and through whom only, quotas were adjusted and credits given. We think the testimony greatly preponderates in that direction. It is proved the money was deposited with Pulsifer & Co., to be drawn out on that express condition.

So far as the instructions do not conform to the views here presented they were erroneous.

The judgment is reversed and the cause remanded.

Judgment reversed.

PRESLEY M. FUNKHOUSER

v.

JOHN G. WAGNER.

1. BAILMENT—*hiring—burden of proof.* In an action by the owner of a team of horses to recover damages for an injury to them against the hirer for want of proper care, the defendant asked the court to instruct the jury, that if the team hired was in good condition when taken by defendant, and was not returned in such condition, and if the defendant had shown *prima facie* that he took ordinary care of the team, then the plaintiff must show, by a preponderance of testimony, that defendant misused the team so as to cause the injury complained of, which the court refused: *Held*, that the refusal was proper.

2. Where goods, when placed in the hands of a bailee, are in good condition, and they are returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose upon him the burden of showing that he exercised such care as was required by the bailment.

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30a 332

62 59
72a 107

62 59
79a 326

62 59
91a *220

62 59
f93a *589

Opinion of the Court.

APPEAL from the Circourt Court of Iroquois County; the Hon. CHARLES H. WOOD, Judge, presiding.

Messrs. ROFF, DOYLE & McCULLOUGH, for the appellant.

Messrs. BLADES & KAY, for the appellee.

Per CURIAM: We have examined the evidence in this case, and think it sustains the verdict.

The modification by the court, of the 7th instruction asked by the defendant, was obviously proper.

The two refused instructions asked by the defendant, were to the effect, that if the team hired by the defendant was in good condition when taken by him, and was not returned in such condition, and if the defendant had shown *prima facie* that he took ordinary care of the team, then the plaintiff must show, by a preponderance of testimony, that defendant misused the team so as to cause the injury complained of.

The rule laid down by this court, in *Bennet v. O'Brien*, 37 Ill. 250, and *Cumins v. Wood*, 44 Ill. 416, was, that where goods, when placed in the hands of the bailee, are in good condition, and they are returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose on him the burden of showing that he exercised such care as was required by the bailment.

The full benefit of the law applicable to the case of the defendant under that rule was accorded to him by the instructions which were given on his behalf; and the two refused instructions, in the form as asked for, were substantially embraced in the fourth instruction which was given for the defendant.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

WILLIAM C. YEATON *et al.*62 61
49a 122

v.

JAMES BERNEY.

1. *PROMISSORY NOTE—demand not necessary.* Where a promissory note is made payable at a specified time and place, it is not necessary for the payee to make a demand of payment at the time and place specified in order to maintain an action upon the note, or a bill to foreclose a mortgage executed to secure the payment of the note.

2. *SAME—readiness to pay.* But if in such case the maker of the note is at the place of payment at the time designated, and is ready and offers to pay the money, but can not because the note is not there ready to be surrendered, such readiness and offer on the part of the maker will discharge him from liability to pay interest accruing after the maturity of the note.

3. *STATE OF WAR—effect of accruing interest.* So where a note executed in the year 1857 was made payable at a specified time and place in the city of Chicago, and at the time the note became due the payee resided in the then rebellious States of the Union, and had the note there in his possession, it was held, that the fact of the existence of a state of war would not relieve the makers who resided within the Union lines from the payment of interest on the note accruing after its maturity and during the existence of hostilities, as no legal obstacle was in the way of their being at the time of payment at the place designated, the same being within the Union lines, and offering to pay the note, thus relieving themselves from liability to pay such interest. Such readiness and offer to pay would have been no breach of duty toward their government. Nor did the fact of the existence of hostilities between the United States Government and the confederate *de facto* government relieve such of the makers of the note as resided within the confederate lines from liability to pay such interest, as no legal obstacle was in the way of their paying the note there to the payee, the latter also residing there and having the note in his possession.

APPEAL from the Superior Court of Cook County.

Messrs. ROGERS & GARNETT, for the appellants.

Mr. LAMBERT TREE, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

On the 8th day of May, 1857, Berney, the appellee, sold and conveyed to appellants a certain block of land situate in the

Opinion of the Court.

city of Chicago. Of the consideration, the sum of \$33,040 was to be paid by appellants in five installments, and for which they gave their five joint promissory notes of that date, payable to the order of appellee in one, two, three, four, and five years, respectively, after date, at the office of S. H. Kerfoot & Co., in the city of Chicago. None of the notes bore interest on their face. To secure these notes appellants gave back to appellee a mortgage of the premises purchased.

At the time of these transactions, Berney, the payee, was a citizen and resident of the State of Alabama, where he continued to reside during the whole period of the pendency of the late civil war, and kept all of the unpaid notes in his possession during that time. The appellants Beverly and Skinner, two of the makers of the notes, were within the confederate lines during the war, as was the payee, Berney; and the appellants Yeaton and Duval, the other two makers of the notes, were, during all the time of the pendency of the war, within the Union lines. These facts are conceded by both parties. It is also conceded that appellants have paid all of the principal and interest on these notes except the sum of \$2,655.58, which was the amount of interest accruing upon such portion of said indebtedness as remained unpaid during the pendency of the war. Appellants, claiming that such unpaid portion did not draw interest during the war, filed their bill against Berney to have the mortgage declared satisfied and discharged, whereupon he answered, and filed his cross bill to foreclose the mortgage for this interest. The above facts appearing, the court below dismissed appellant's original bill and entered a decree of foreclosure upon the cross bill. The complainants in the original bill bring the case to this court by appeal, and assign for error the decree of the court dismissing their bill and granting the relief upon the cross bill.

We are of the opinion that the court below decided correctly.

These notes were made payable at a specified time and place. It was not necessary for Berney to make a demand of payment at the time and place specified, in order to maintain an action upon the notes, or a bill to foreclose the mortgage. *Butterfield*

Opinion of the Court. Syllabus.

v. *Kinzie*, 1 Scam. 445. But if the makers, or any of them, were at the place at the time designated, and were ready and offered to pay the money, and could not pay it because the notes were not there to be surrendered up, such readiness and offer would have discharged them from liability for interest. *Wallace v. McConnell*, 13 Peters, 136.

Two of the makers of the notes resided, during all the time in question, within territory entirely under the control of the government of the United States, to which they adhered. The place where the notes were specifically payable was also within such territory. It would have been no breach of duty on the part of these two makers, toward their government, to have prepared themselves and offered, at the place where the notes were payable, to pay the money. This was all they were required to do to discharge themselves from all liability to pay interest. And the circumstances present no legal obstacle to the accomplishment of that result.

Then, on the other hand, the other two makers resided within the so called confederate States, and they and the payee of the notes were all the time within the military lines of that *de facto* government. Berney had the notes there in his possession. What legal obstacle was there in the way of payment there?

The circumstances of this case do not bring it within the rule, or the reason of the rule, by which interest is suspended during a state of war.

The decree of the court below must be affirmed.

Decree affirmed.

SAMUEL OGDEN *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

SCIRE FACIAS ON FORFEITED RECOGNIZANCE—of the default. A party charged with larceny, having undergone a partial preliminary examination,

Statement of the case.

was recognized to appear before the justice "on the 2d day of February, A. D. 1869 * * * and from day to day thereafter until discharged by order of the court," for the purpose of a further examination. The accused appeared on the 2d of February at the time appointed, when one witness was sworn and the prosecution continued until the 6th of February without any new bond. The accused failed to appear on the 6th, and the justice then made the following entry: "Defendant did not appear, so the court considered that the bond of recognizance be forfeited," etc. *Held*, the accused having appeared on the day fixed in the recognizance, and thus complied with its condition, the justice had no right to enter a default for his non-appearance on the 6th, and a *scire facias* issued on such default was void.

WRIT OF ERROR to the Circuit Court of Peoria County.

This was a *scire facias* issued on the following recognizance:

"STATE OF ILLINOIS, }
"PEORIA COUNTY, } ss:

"This day personally appeared before the undersigned, Sebastian Kraus, one of the justices of the peace in and for said county of Peoria, Samuel Ogden and John Wienmar, and jointly and severally acknowledged themselves to owe and be indebted unto the people of the State of Illinois, in the sum of five hundred dollars (\$500), to be levied of their goods and chattels, lands and tenements, if default be made in the premises and conditions following, to wit:

"Whereas, the above bounden Samuel Ogden, on the 29th day of January, A. D. 1869, was brought before Sebastian Kraus, a justice of the peace in and for the county aforesaid, on a charge preferred against him for larceny, and upon hearing the testimony of all the witnesses present, they having been duly sworn, was adjudged and required by said justice to give bond, as required by the statute in such case made and provided, for his appearance to answer to said charge. Now, the condition of this recognizance is such that if the above bounden Samuel Ogden shall personally be and appear before said justice on the 2d day of February at one o'clock P. M., in said county of Peoria, A. D. 1869, and from day to day thereafter

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until discharged by order of this court, then and there to answer to the said people of the State of Illinois on said charge of larceny, and abide the order and judgment of said court and not depart the same without leave, then and in that case this recognizance to become void, otherwise to remain in full force and virtue.

"As witness our hands and seals this 29th day of January, A. D. 1869.

"SAMUEL OGDEN, [SEAL.]
"JOHN M. WEINMAR. [SEAL.]

"Taken, entered, and acknowledged before me this 29th day of January, A. D. 1869.

"SEBASTIAN KRAUS, J. P."

Judgment was entered on the *scire facias* against the defendants, to reverse which they bring the record to this court.

Messrs. KELLOGG & KELLOGG, for the plaintiffs in error.

Mr. GEORGE PUTERBAUGH, State's attorney, for the People.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

The recognizance upon which the *scire facias* was issued, was taken in pursuance of the statute, by a justice of the peace, for the appearance of the accused, for further examination. R. S. 1845, 581.

Section 2d of the act provides that, if the person recognized, shall not appear at the time appointed, the justice shall note the default upon the record, and certify the recognizance, with the record of the default, to the Circuit Court, that a *scire facias* may issue thereon, or an action of debt be brought for the recovery of the penalty.

The time appointed for further examination was the 2d day of February. It appears, from the transcript of the justice of the peace, that the accused did appear on that day ; a witness was sworn ; and the prosecution was then continued until the 6th of February, without any new bond, or any minute of default.

On the 6th the justice made the following entry: "Defendants did not appear, so the court considered that the bond of recognizance be forfeited, etc."

The condition of the recognizance was to appear upon a day named. The accused did appear, and thus complied with the condition.

The justice had no right to enter the default when in fact there was none. The only authority to do so is the non-appearance of the cognizor at the time appointed.

No *scire facias* could properly issue from the Circuit Court, until a proper certificate of default had been filed therein by the justice. It follows that the *scire facias* is void.

There are other errors in the record which it is unnecessary to notice.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM GOGGIN

v.

WILLIAM T. O'DONNELL.

1. PLEA IN ABATEMENT—*non-joinder of secret partner*. In an action of assumpsit to recover the value of services rendered, the defendant pleaded in abatement the non-joinder of his alleged partner: *Held* that proof showing there was such a partner, but that he was a secret partner, and of whom the plaintiff had no knowledge at the time he was employed by the defendant, would not support the plea.

2. SAME—*assessment of damages when issue is found against the defendant, whether jury should assess them*. Where a plaintiff takes issue on a plea in abatement, and the jury find against the defendant, they should assess the plaintiff's damages so that final judgment may be given. It is not necessary to swear the jury specifically to assess the damages, but swearing them to well and truly try the issue joined between the parties, and a true verdict render according to the evidence, includes the assessing of the damages.

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

62	66
96a	47
96a	48
62	66
194	100

Opinion of the Court.

Messrs. MOORE & CAULFIELD, for the appellant.

Mr. JOHN A. HUNTER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was a suit in assumpsit, to recover the value of services rendered.

There was an issue of fact on a plea in abatement of the non-joinder of an alleged partner, which was tried by a jury, and found for the plaintiff, and his damages were assessed by the jury.

The first point urged as a ground for the reversal of the judgment is, that the verdict is against the evidence.

There was proof of the existence of a partner with the defendant, in the business in which he had employed the plaintiff, but the evidence went strongly to show, that he was but a secret partner, and that the plaintiff had no knowledge of the fact at the time he was employed, and, in that case, the plea would not be supported. 2 Greenlf. Ev., § 25 ; *Page v. Brant*, 18 Ill. 37.

The testimony was conflicting in regard to the amount of the plaintiff's claim, but there was evidence to justify the amount of damages as found by the jury ; and we can not say the verdict is unsupported by the evidence.

It is next objected, that the jury on finding the issue for the plaintiff, assessed his damages. It is said the jury were only empaneled and sworn to try the issue joined, which was, were defendant and Lyman partners, at the time when, etc. ? that the jury had only to answer this question in the affirmative or negative, and that question answered, their duty was ended, and they should not have assessed the damages.

But the duty of the jury was just the reverse, under the law.

If the plaintiff take issue upon a plea in abatement, he ought to pay damages, because if it be found against the defendant, the jury must assess the plaintiff's damages, and final judgment is to be given. 1 Chit. Pl., 498 ; 2 Saund., 211 n. 3.

Opinion of the Court. Syllabus.

It was not necessary that the jury should have been sworn specifically to assess the damages. Being sworn to well and truly try the issue joined between the parties, and a true verdict render according to the evidence, included the assessing of the damages.

We perceive no error in the instructions given on either side.

The judgment of the court below is affirmed.

Judgment affirmed.

ORRIN FORSYTH *et al.*

v.

WILLIAM C. WARREN.

1. *ATTACHMENT—publication of notice—of the computation of the sixty day's time required by the statute.* In the computation of time under the section of the attachment act, requiring that sixty days shall intervene the first publication of notice and the term of court, the rule is to exclude the day on which the notice is first inserted in the newspaper, and include the day on which the term commences.

2. *SAME—notice of publication—whether defective.* In an attachment suit, the notice of publication recited a date to the writ subsequent to the return term. Such mistaken and unnecessary date, the notice without regard to the same being otherwise in full compliance with the statute, was not regarded as a fatal defect in the notice.

3. *JUDGMENT IN ATTACHMENT—when limited to the amount claimed in the affidavit.* It is a fatal error for the plaintiff in an attachment in which there is no other jurisdiction obtained in the case except by levying the attachment and publishing the notice, to take judgment for more than the sum claimed in the affidavit and notice, with the subsequently accruing interest.

4. *SAME—waiver of such error.* Nor does the defendant waive such error by coming into court after judgment, though at the same term, and praying an appeal.

APPEAL from the Superior Court of Chicago.

This was an attachment suit brought by William C. Warren,

62	68
33a	346
62	68
154	667
62	68
180	465
62	63
181	595

62	68
109a	1196

62	68
112a	1808

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against Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth.
The following is the affidavit upon which the writ was issued :

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

William C. Warren, being duly sworn, says, on oath, that Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth, partners doing business under the name of Forsyth & Co., of the city of Rochester, county of Monroe, and State of New York, are justly indebted to deponent in the sum of \$230.60, for services rendered by deponent for said firm, and for commissions due deponent on sales of the goods, wares, and merchandise of said firm ; and deponent further says, that the said Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth, composing said firm of Forsyth & Co., are not residents of the State of Illinois.

W. C. WARREN.

Subscribed and sworn to before me this 31st day of August,
A. D. 1869.

A. JACOBSON,
Clerk of the Superior Court of Chicago.

Publication of notice was as follows :

State of Illinois, Cook County. Superior Court of Chicago,
September Term, A. D. 1869.

WILLIAM C. WARREN
vs.
ORRIN FORSYTH, WILLARD ABBOTT, AND
JOSEPH F. FORSYTH, *Partners, etc.* }

Public notice is hereby given to the said Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth, partners, etc., that a writ of attachment, issued out of the office of the clerk of the Superior Court of Chicago, dated the 31st day of September, A. D. 1869, at the suit of the said William C. Warren, and against the estate of the said Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth, partners, etc., for the sum of \$230.60, directed to the Sheriff of Cook County, which said writ has

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been returned executed. Now, therefore, unless you, the said Orrin Forsyth, Willard Abbott, and Joseph F. Forsyth, partners, etc., shall personally be and appear before the said Superior Court of Chicago, on or before the first day of the term thereof, to be holden at the court house in the city of Chicago, on the first Monday of September, A. D. 1869, give special bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said William C. Warren, and so much of the property attached as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

A. JACOBSON, *Clerk.*

And the following is the publisher's certificate:

This certifies that a notice, of which the annexed printed slip is a true copy, was published for four successive weeks, to-wit: Four times in the daily edition of the *Chicago Republican*, a newspaper published in the city of Chicago, and of general circulation throughout Cook County and the State of Illinois; and that the date of the first paper containing the same was the second day of September, 1869, and that the date of the last paper containing the same was the twenty-third day of September, A. D. 1869, and that we have received \$6.50 for publishing the same.

Dated at Chicago, this 25th day of October, 1869.

L. W. POWELL, *Publisher.*

At the return term of the writ the cause was continued, as also at the October term following; but at the next succeeding term of the court, which began on the first of November, 1869, the default of the defendants first being entered, judgment was rendered in favor of the plaintiff for \$238.65, and costs.

To reverse this judgment the defendants appeal.

Messrs. HITCHCOCK, DUPEE & EVARTS, for the appellants.

Messrs. DENT & BLACK, for the appellee.

Opinion of the Court.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

In this case the judgment was set aside, and a rehearing granted by the court, upon its own motion.

The objection, that sixty days did not intervene between the first insertion of the publication of notice and the first term of the court, is not well taken. In the computation of the time, in such case, the rule established is to exclude the day of the first insertion, and include the first day of the term. By this rule, sixty days did intervene. *Vairin v. Edmonson*, 5 Gilm. 270.

The recital in the notice of publication of a date to the writ of attachment subsequent to the return term, is not a fatal defect. Independent of this recital, the notice informed the debtor of the attachment, against whose estate, for what sum, and before what court it was pending, and that, unless he appeared at the court house in Chicago at a fixed time, and plead, judgment would be given against him. The statute was fully complied with, and the party could know from the notice when and where to appear and defend the attachment. He could not have been misled by the mistaken and unnecessary date.

The last objection is, that the judgment exceeds the sum stated in the affidavit and subsequently accruing interest. There was no other jurisdiction obtained in the case, except by levying the attachment and publishing the notice. The excess is conceded. The cases of *Rowley v. Berrian*, 12 Ill. 202; *Hichins v. Lyon*, 35 Ill. 150; and *Hobson v. Emporium Co.*, 42 Ill. 306, hold that this is error.

We can not accede to the proposition urged by appellee, that appellants waived this error by coming into court after judgment, though at the same term, and praying an appeal. If the exercise of the right which the law gave him to correct the error by appealing to this court, is to be deemed a waiver of the error in this case, we are unable to see why it would not in every other.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

LEVI GLADFELDER *et al.*

v.

T. JUDSON HALE.

1. **EJECTMENT**—*contract of sale no defense.* When a plaintiff in ejectment shows a legal title in himself, the defendant can not defeat a recovery by showing that the plaintiff had brought suit upon a note given to him by one who had contracted to purchase the land of him.

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was an action of ejectment brought by T. Judson Hale against Levy Gladfelder and others, in the Knox Circuit Court to recover the S. E. 14. 12 N. 4 E. The facts not stated in the opinion are to be found reported in 52 Ill. 93.

Messrs. GARRISON, SANFORD & ANDERSON, for the appellants.

Mr. LEANDER DOUGLASS, for the appellee.

Per CURIAM: This case has been already before this court, and is reported in 52 Ills. 93, where the facts are stated and all the questions decided. It is there held that the plaintiff was entitled to recover, and the only new evidence offered on the last trial was the record of a suit brought by Hale against Snickard to recover the purchase money due on the contract of sale. It is said this was an affirmation of that contract, and takes from Hale the right to bring ejectment. We are utterly unable to see what bearing this evidence has upon that question. Hale proved the legal title in himself, and there was no connection between the defendants and Snickard. The judgment is in conformity with the opinion given when the case was here before, and is affirmed for the reasons then given.

Judgment affirmed.

JOHN P. WHITE *et al.*

v.

FERDINAND W. HERRMAN.

1. EVIDENCE—*secondary—best must be produced.* Where the obligors in a written instrument obtained its possession, refused to deliver the same to the obligee, but gave a copy thereof and destroyed the original, and when sued denied the execution of the contract declared on in a plea verified by affidavit, it was held that the copy, when accepted as such, was, as between the parties, of equal authenticity with the original.

2. And when it appeared that such copy was left with plaintiff's attorney for suit, it was held error in the court to admit in evidence a copy of it made by plaintiff's attorney, upon the testimony of plaintiff that it was a copy of the original as nearly as he could recollect. The copy given by defendants was the next best evidence to the original, and should have been produced or its non-production explained.

3. EVIDENCE—*proof of value.* In a suit to recover damages for a failure to convey title when only a small sum was paid, the preponderance of the testimony showed that the land was worth no more than was agreed to be paid, but the plaintiff showed, without objection, that other lots in an adjoining tract had sold much higher by the front foot. This proof did not disclose the terms of the sale, the number of lots sold, or whether the purchases were *bona fide*: Held, that such evidence was too vague and unsatisfactory to furnish a proper indication of the value of eighty acres sold in a body.

APPEAL from the Superior Court of Cook County; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. C. H. WILLETT, for the appellants.

Mr. H. B. HURD & Mr. JOHN W. KRAMER, and INGWELL OLESON, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

White and Henderson, the appellants, who were real estate agents in Chicago, on the 10th of September, 1868, sold to

Opinion of the Court.

Herrman, the appellee, eighty acres of land, situated near the city, and gave him a contract signed by them as the vendors. They annexed to their signature the word "agents," but the contract did not disclose the name of their principal, and, by its terms, made them personally liable. The purchaser paid in hand only one hundred dollars. The residue of the first payment was to be made on delivery of abstract of title and deed. On the 13th of September, Herrman called at the office of White & Henderson to inquire as to the abstract. One of the firm then asked him for the contract in order to take it to Hardin, the owner of the land, and procure his written ratification. The contract was surrendered for that purpose to White, who went out of the office and in a few minutes returned, saying the owner would not ratify the sale. He refused to give back the original contract to Herrman, but gave him a copy. Herrman brought suit against White & Henderson for refusing to convey, and recovered a verdict and judgment for \$5,100, from which they have prosecuted this appeal.

On the trial the plaintiff was placed upon the stand and asked whether the written instrument attached to the declaration was a copy of the original contract. He answered it was, as nearly as he could recollect. It appeared by a further examination that the copy made by White from the original contract and delivered to plaintiff, had been delivered by the latter to his then legal adviser, and, so far as appears, was still in his hands. He was not summoned, or, at least, did not appear. The execution of the contract had been denied by the defendants in a plea verified by affidavit. Under these circumstances, the court admitted in evidence the instrument attached to the declaration. In this, we think, there was error. The instrument given by White to the plaintiff as a copy or duplicate of the original contract, and accepted by the plaintiff as such, was, as between these parties, of equal authenticity with the original, and was within the power of the plaintiff. Next to the original it was the best evidence, and should have been produced, or its non-production should have been

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explained. There was no testimony that the instrument admitted in evidence had been compared with that furnished by the defendants, and the plaintiff could only say that it was a copy of the original, as nearly as he could recollect. This was very unsatisfactory. Probably the court admitted this copy on the ground that it was proven by the defendant White, that he had destroyed the original, and, therefore, this copy could be received upon the testimony of the plaintiff as to his belief in its identity with the original. This might have been so had it not appeared there was better evidence to be had—an instrument as authentic as the original itself. Under the circumstances, the admission of this paper was error.

We are the more ready to reverse this judgment for this error, because we think the damages are much larger than the evidence justifies. The great preponderance of the testimony certainly shows that the land, sold, as it was, by the acre, was worth no more than the price the plaintiff agreed to pay. The only evidence to the contrary is based upon the price which some town lots in an adjoining tract brought at an auction held about the same date. These lots were sold by the front foot. This testimony, to which no objection was made on the trial, does not disclose the terms of the sale, nor the number of the lots thus sold, nor whether the sales were to purchasers who bought in good faith and who have paid their bids. The entire testimony as to these sales was of a very vague and unsatisfactory character, and furnished an extremely imperfect indication of the value of a tract of eighty acres sold in a body, the purchase money payable one-half in hand and the balance in one year, with eight per cent interest. While the defendants were censurable if they did not disclose at the time of executing the contract, that the property really belonged to another person and the sale must be ratified by him, which White testifies was done, still, in this action, they are not to be punished by exemplary damages. The judgment must be reversed, and the cause remanded.

Judgment.

Syllabus.

EDWARD G. MASON, Executor, etc. *et al.*

v.

GUSTAVUS H. BAUMAN.

1. *AGENCY—sale whether as agent or owner.* Where a person holding a note, secured by mortgage, to be sold by him as agent for his principal at not less than a given sum, took an absolute assignment of the same to himself for the price named, for which he gave his principal credit on his books, and afterward sold the same at an advanced price, professing to be acting as agent, and stating to the purchaser that he had just obtained the consent of his principal to make the sale: *Held*, that these facts showed that at the time of the sale, he was still acting as agent, notwithstanding the absolute assignment to him.

2. *SAME—purchase by agent, fraudulent concealment.* Where an agent holding a note and mortgage for sale was offered \$4,800 therefor, afterward purchased the same of his principal for \$4,500, without disclosing the offer he had: *Held*, that if the agent at the time of his purchase failed to disclose important facts to his principal, he failed to acquire a complete title, and was bound to account to his principal for whatever sum he realized out of the sale of the note and mortgage.

3. *SAME—agent's liability to principal.* Where the owner of a note, secured by mortgage, placed the same in the hands of a creditor, properly indorsed, to be sold in the market to raise money for the owner's benefit, and finally assigned the same absolutely for \$4,500, for which the agent gave him credit on his books, but shortly afterward, professing to act on behalf of his principal, sold the securities for \$5,000: *Held*, that he was bound to account to his principal for the full amount received by him.

4. *SAME—agents' fraud.* While it is true that the principal is bound by the fraudulent acts of his agent perpetrated on third persons while acting under his authority in reference to the subject of his agency, yet a person dealing with the agent is not liable to the principal for the acts of the agent in fraud of the rights of the principal, when such person is not himself a party to the fraud.

5. *SALE BY AGENT—effect of agents' fraud on title of purchaser.* Where an agent under a valid power sells and indorses negotiable paper in fraud of the rights of his principal, to *bona fide* purchasers, for a valuable consideration paid without notice that the agent is acting fraudulently toward his principal, and there is nothing on the face of the papers, or circumstances of the case, to put them upon inquiry, the purchasers will acquire a title free from all equities existing between the principal and agent.

6. *SALE—notice of equities.* Where the owner of commercial paper in-

Syllabus.

dorsed the same to an agent, in form absolute, to enable him to sell the same in the market, and the paper was fair on its face, not yet due, and nothing to excite suspicion or put the purchasers on inquiry, it was held that the purchasers who paid value therefor, would not be held chargeable with notice that the agent was acting fraudulently merely because the purchasers knew that the seller was acting as agent, or because one of them was a relative of the agent.

7. SAME—*fraud as affecting agent's power.* Where an agent, in selling negotiable paper for his principal, acted within the scope of his authority, his subsequent fraud in retaining part of the proceeds of the sale from the principal, will not affect the title of the purchaser who buys in good faith.

8. FRAUD—TRUST—*title when purged from.* Where an agent sold a note, secured by mortgage, under an authority from his principal, to a *bona fide* purchaser for a fair price, who took without notice of any equities between the agent and the principal, and who foreclosed the mortgage and acquired title to the mortgaged premises: *Held*, that such purchaser acquired a title free from all the equities existing between the principal and agent; and that the agent, some years afterward, having purchased the same, could hold the same, and that a decree allowing the principal to redeem from the sale was erroneous.

9. SAME. But had the agent fraudulently sold the securities with a view of acquiring title in himself, and employed the purchaser as an instrument to accomplish such purpose, and thereby acquired title to the mortgaged premises, then the fraud, notwithstanding the power of sale, would have followed the property, both in the hands of the purchaser and his own, and his principal would have had a right to redeem.

10. SAME. The owner of a note and mortgage of \$7,500, being embarrassed, indorsed the same to B, a creditor, to sell for the purpose of raising money to meet his liabilities, with directions not to sell for less than \$4,500. B, afterward, as the agent, sold the same to *bona fide* purchasers for \$5,000, B having no interest whatever in the purchase. B only accounted for \$4,500, and some interest. The purchasers foreclosed and acquired thereby the title to the mortgaged premises; and about five years and a half after their purchase, sold and conveyed the premises to B for \$7,000. The owner then filed his bill praying to be allowed to redeem, by paying B the amount received from him, with interest, on the ground of fraud on the part of B, which was so decreed. *Held*, that the decree was erroneous in allowing a redemption; but if B had failed to pay over all he received for the note and mortgage, a decree for the unpaid balance in his hands, with interest, would be proper.

APPEAL from the Superior Court of Chicago; the Hon. JOHN A. JAMESON, Judge, presiding.

Opinion of the Court.

The opinion sufficiently states the case.

Messrs. WAITE & CLARKE, for the appellants.

Messrs. ROSENTHAL & PENCE, and Mr. D. P. JONES, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:→

This was a bill in chancery, filed by appellee in the Superior Court of Chicago, against the executor, heirs, and legatees of Charles R. Starkweather, deceased, to the November term 1867. The object of the bill was to obtain leave to redeem lots 5 and 6 in block 1, in Johnson, Roberts and Storr's addition to Chicago. It is not contested that appellee, in 1858, was so far indebted to different persons as to be greatly embarrassed in his pecuniary affairs, and was at that time a tenant of Starkweather, and was indebted to him in a sum of from \$1,500 to \$1,800 on account of rent. v*

They entered into an arrangement by which Starkweather was to aid appellee in paying his debts, and to enable him to do so, and as security for the rent due and to become due, appellee transferred to him a mortgage held on one Eggerman on the lots in controversy, to secure the payment of \$7,500, due in eight years from its date. Also, as a part of the same transaction, appellee executed a deed of trust to one Kinsella, for the use of Starkweather, on some lands in Du Page County, and assigned a certificate of purchase given by the sheriff, of a house which had been sold on execution. These assignments and transfers were absolute in form, but were subject to a defeasance which required them or such portions of them to be returned as should remain after paying appellee's debts. The claim is, whatever may have been its purpose, that this arrangement was made to secure Starkweather his debt for rent, and to enable him to raise money to free appellee from his embarrassment. Appellee also gave Starkweather a chattel mortgage.

Opinion of the Court.

During the year ensuing this transaction Starkweather sold a portion of appellee's property and paid a part of his debts.

In September, 1859, appellee wrote Starkweather, urging him to sell the Egerman mortgage at a price not less than \$4,500. He had previously held it at a higher price, but he yielded to the pressure which prevented its sale at the sum he previously asked. On the 3d day of November, 1859, appellee made an absolute assignment of the Egerman mortgage to Starkweather for \$4,500, as is stated in the assignment; and under that date Starkweather gave appellee credit on his books for that sum for the mortgage, and \$325 on account of interest on the mortgage. At the same time he gave Starkweather a receipt for the sheriff's certificate of purchase of the house. Afterward, on the 22d of the same month, Starkweather transferred the mortgage on Egerman to W. B. Hale, who purchased for himself, S. M. Smith, and H. K. Starkweather, of Massachusetts, and received from them the sum of \$5,000 therefor. Starkweather indorsed the note to Hale without recourse.

These persons all swear that they were *bona fide* purchasers of the mortgage for its value, and without any notice of the claim of appellee or any other person to the mortgage or note. They further swear that Charles R. Starkweather, after they purchased, had no interest in the mortgage, either directly or indirectly, and neither received interest or rents for himself until they again sold the premises to him after the foreclosure of the mortgage and their purchase under the foreclosure sale. Egerman having made default in payment, the assignees of Charles R. Starkweather, in October, 1862, filed their bill to foreclose the mortgage, and only made Egerman a party defendant. The bill was taken as confessed; a reference was made to the master, who reported there was \$8,173.75 due on the mortgage; and on the 23d of January, 1863, a final decree was rendered, ordering the payment of the money, or, on a default, that the premises be sold. On the 28th of June, 1863, complainants in that suit became the purchasers at a sale of the property under the decree. The time for a redemption having expired on the 10th of April, 1865, they conveyed the premises to C. R.

Opinion of the Court.

Starkweather for \$7,000. He subsequently expended about \$1,000 in changing the grade, so as to render the house more accessible.

It is claimed that Starkweather was but a trustee, and that the second assignment, bearing date November 3d, 1859, did not change that relation; that those who purchased of him had notice that he was a trustee, and that they were dealing with a trust fund, when they took the assignment of the note and mortgage; and that when Starkweather afterward purchased the property of them, he acquired it burdened with the trust; it is also insisted that, at the time Starkweather received the last assignment, he then had an offer of \$4,800, which he fraudulently concealed from appellee; and on these grounds appellee claims the right to redeem from Starkweather, as the mortgagee of the premises.

✓ It is manifest that Starkweather was the agent of appellee for the sale of this note and mortgage up to the 3d day of November, 1859, when the last assignment was made by appellee to him; and if, from their relations, he failed to disclose all facts important to be known by appellee, he then failed to acquire a complete title to the note and mortgage, and he still remained an agent. That transaction, even if it were conceded that he practiced a fraud on appellee, did not divest him of power still to make a sale and to transfer the whole title to the purchaser, if the latter acted in good faith and paid value for the note and mortgage. Appellee did not then or at any subsequent time do any act manifesting an intention to withdraw the power to sell; and on the 22d of November, when Starkweather assigned the securities to Hale, there was ample power to pass all of the title, whether legal or equitable, whether held by Starkweather or appellee, in the purchaser without notice who paid value. And Hale and his associates in the purchase swear unqualifiedly that they purchased without notice and paid \$5,000; and that Starkweather held no interest, either directly or indirectly, in these instruments, from the time they purchased them until they sold him the lots—some five years and a half afterward; and we find no witness who in anywise contradicts the statements of these witnesses.

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It is, however, urged that they knew that Starkweather was appellee's agent, as he professed in his letters before and after the assignment of the 3d day of November, 1859, to be selling for another person, and not as the owner. We are unable to comprehend how that fact could charge them with notice that Starkweather was acting fraudulently toward his principal. A man is always bound by the fraudulent acts of his own agent perpetrated on a third person, whilst acting under his authority in reference to the subject of his agency; but we are aware of no rule or any adjudged case which holds that a person can ever be bound by the fraudulent acts of another man's agent. And why should they? They do not appoint the agent; they confer upon him no authority, and do no act that should in morals or in law render them liable for the acts of another man's agent upon whom they conferred no power. When Starkweather offered, as the agent of appellee, to sell them these securities, all they were required to do was to see that he had authority to sell and transfer the title to them, and this they found in appellee's assignment of the 3d of November. Without notice they were not required to look further and learn the relations that existed between the principal and agent. Here was commercial paper, fair on its face, regularly assigned, not due, and negotiable, offered by an agent for sale, and they purchase, without seeing on the papers any thing to excite suspicion, nor does the evidence disclose any thing to have put them on inquiry. Why, it may be asked, did they not acquire a title to this negotiable paper free from all equities that may have existed between the principal and agent? No reason has been suggested, nor does any occur to us, unless they were chargeable with notice; and we find no evidence to charge them.

If any trust relation existed between Starkweather and appellee, beyond a mere agency, where is the evidence that the assignees of this note and mortgage knew of the fact, or where are the facts to put them on inquiry? We fail to find them in this record. The note not being due, the statute authorized them to purchase it, without notice of a defense, and to enforce its payment. Having done so we are not inclined to charge

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them upon mere conjecture, or that they might have known, because some of them were relatives of Starkweather.

But if Starkweather was guilty of a fraud, in what did it consist? It can not be said that he used any fraudulent means to induce appellee to sell these securities. Appellee had not only in the first instance given such authority, but we see from his letters that he was urging him to make a sale, as he declared he was unable to hold them. If Starkweather, when he sold, was but the agent of appellee, and he seems to have been, as he says in his letter of the 7th of November that he had that day procured the consent of the owner of these securities that he might sell, then he was bound to pay to him the full amount he received for them. And if he retained any portion of that sum without appellee's consent, it was a fraud on appellee, authorizing him to sue and recover any balance which he had failed to pay to him. And that Starkweather was still merely an agent when he made the sale seems to be true, or why say, on the 7th of November, when he wrote, that he had then procured the consent, when he had received the assignment on the 3d, four days previously? We can see no reason why he should misrepresent, as to the time, as he could, no doubt, have just as readily induced the purchaser, to whom he was writing, to take these securities by saying that he had four days before that time purchased the note and mortgage, as by representing that he was selling for another. We must presume, then, notwithstanding the assignment, that he was acting as agent, and not as owner, in selling them.

For the want of perfect good faith in disclosing the fact that he received \$5,000 on the sale of these instruments, he was guilty of a fraud, not in selling, but in retaining a portion of the purchase money. The power to sell being ample and being legally exercised, the purchasers took the title free from all charge of fraud. It vested in them, we have seen, free and untainted with fraud and unburdened with equities of any kind. And when the purchasers converted these securities into real estate, by foreclosing the mortgage and acquiring the title to the mortgaged premises, they held them in like manner.

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And the property was in the market of the world, and could be purchased and held by any person who might choose. And as the securities had been extinguished and real estate procured with them, Starkweather might purchase and hold the land, precisely as he could had the money been collected and invested in other real estate. For his fraud he was liable to account for the unpaid portion of the purchase money he received. Appellee had no right to pursue either the note and mortgage or the land, as his only remedy was an action against his agent, the sale being in pursuance to a power well and lawfully exercised. There was no lien attached to the securities, and none could attach to the lots in controversy. Had Starkweather fraudulently sold these securities to the purchasers with a view of acquiring title to these instruments, and had he employed these purchasers as instruments to accomplish that purpose, or ultimately to acquire title to these lots, then the fraud, notwithstanding the power of sale, would have attached to and followed the property both in the hands of the fraudulent purchasers, and his own when he subsequently acquired the title, and that would have given appellee a right to redeem. But the evidence fails to show that such was the purpose, but, on the contrary, it is rebutted. Here was no perversion of a trust fund, as the trust, if one existed, was fairly executed according to the desire of the *cestui que trust*, and there is no ground for pursuing the property as being charged with a trust.

The court below erred in authorizing a redemption; but if Starkweather failed to pay over to appellee any portion of the money received on the sale of the note and mortgage, then appellee should have a decree for that amount, with interest. The decree of the court below is reversed and the cause remanded.

Decree reversed.

Mr. JUSTICE BREESE, dissenting :

I do not concur in this opinion. I am satisfied, from all the testimony in the cause, that the transaction between Bauman and Starkweather was a mortgage only—the transfer of the

Opinion of the Court. Syllabus.

Egerman mortgage of seven thousand five hundred dollars, was intended merely as a security for the indebtedness of Bauman to Starkweather. This indebtedness is not proved to have exceeded one thousand eight hundred or one thousand nine hundred dollars for rent, and some indefinite amount for money loaned, whether five dollars or five hundred dollars, is not shown. It is not shown that Starkweather delivered up to Bauman any securities he held against him, which Starkweather would have done had Bauman sold the Egerman mortgage to him.

It is clear to my mind, the relation between Starkweather and Bauman, as to this property, was that of mortgagor and mortgagee, and as Bauman has never been foreclosed, his right to redeem exists in full force.

I therefore am of opinion the decree should be affirmed.

THORNTON, J. I do not concur in the opinion of the majority of the Court.

ALBERT F. LINCOLN

v.

ALLEN G. STOWELL.

1. PLEADING AND EVIDENCE—*variance*. An allegation in a declaration, of a contract, that if the plaintiff would bring about and effect a sale for defendant of his lumber yard and materials, defendant would permit plaintiff to retain one-third interest in the premises and materials, and, in addition thereto, would give him one-third of one-half for effecting the sale, it seems, is not sustained by proof that defendant offered plaintiff if he would make sale of two-thirds of the concern, he would retain one-third and give plaintiff one-half of that, for selling the other two-thirds, and that plaintiff might account for the rest. The pleading and proof is variant.

2. NEW TRIAL—*finding of jury*. To entitle the plaintiff to recover, he must establish his right by a preponderance of testimony. When the testimony of the plaintiff is expressly contradicted by that of the defendant, and defendant is corroborated by two other witnesses, a verdict for the plaintiff is not sustained by the evidence, and it is error to refuse a new trial.

69	84
85a	490
62	84
97a	*188

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WRIT OF ERROR to the Circuit Court of Peoria County ;
the Hon. S. D. PUTERBAUGH, Judge, presiding.

Mr. H. GROVE, COOPER & MOSS, and F. W. VOIGT, for
the plaintiff in error.

Messrs. INGERSOLL & McCUNE, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was an action of assumpsit brought by Stowell against Lincoln, to recover for services claimed to have been rendered by the former, for the latter, in selling a lumber yard, and stock of materials owned by Lincoln.

The declaration contains three special counts, and the common counts, and sets out in the special counts a contract under which the alleged services were rendered, in these terms : That if Stowell would bring about and effect the sale for Lincoln, of said yard and materials, Lincoln would permit Stowell to retain one-third interest in the premises and materials ; and, in addition thereto, would give him one-third of one-half, for effecting the sale.

Stowell on the trial testified to the contract, as follows : " He (Lincoln) said if I would make a sale of two-thirds of the concern, he would retain one-third, and would give me one-half of that for selling the other two-thirds, and I might account for the rest."

The testimony of Lincoln, on the trial, contradicted that of Stowell in every material point.

Lincoln testified that he never made such a contract ; that he never asked Stowell to sell the property ; never employed him to sell it, and never had any talk with him about selling it for him ; that the only conversation they had was, that Stowell " said he was going to find some one with capital to buy out my (Lincoln's) business, so as to give him employment. That he never offered him any thing for doing so."

To entitle the plaintiff to recover, he must establish his cause of action by a preponderance of testimony.

Opinion of the Court. Syllabus.

The plaintiff's statement of the contract in his declaration, and on the stand, differs.

The other testimony in the case is in corroboration of that of Lincoln. It appears from that of the two Culters, father and son, who purchased the property, and were witnesses on behalf of the plaintiff, that they made the purchase of Lincoln, and though Stowell was present at the sale, it was at their request, and it would seem rather in their interest and behalf. Thomas Culter testified that Stowell had nothing to do with the matter except to give them information when they asked him. He was taken into their employ immediately after the purchase. The services performed, if any, must have been slight, and there was no direct testimony as to their value. We think the evidence clearly insufficient to sustain the verdict, and that a new trial should have been granted for that reason.

The judgment is reversed and the cause remanded.

Judgment reversed.

FREDERICK BAKER *et al.*

v.

MARY S. SCOTT.

1. *SHELLY'S CASE*—*rule in applies in Illinois.* The common law of England, so far as applicable and of a general nature having been adopted in this State at an early date and continued in force by statute, except so far as the same has been repealed, it follows that the rule in Shelly's case, which is a part of the common law, is in force in this State, it being in harmony with the genius of our institutions, and not in conflict with any statutory provision.

2. *SAME—what is the rule in.* At common law the rule in Shelly's case is not a rule of interpretation, but a rule of property, under and by which all devises of legal estates wherein lands are given to a person for life, or for any greater estate, with an immediate remainder to the "heirs," or "heirs of the

62 86
120 663
69 86
127 40

62 86
129 167

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136 375

62 86
141 343
144 569

62 86
147 225

62 86
150 121
153 379

62 86
156 68
158 388

62 86
87a 387

62 86
206 1 62
206 2 62
206 3 580

Syllabus.

body," of such devisee, the word heirs, or heirs of the body, will operate as words of limitation, and give the devisee an estate in fee simple or in fee tail.

3. *SAME—requisites of the rule.* The requisites of the rule in Shelly's case are, that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs, or heirs of the body of the person taking that estate, by that name, and not to the heirs as meaning or explained to be sons, children, etc.; the heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least, so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor, shall both owe their effect to the same deed, will, or writing; and that the several limitations shall give interests of the same quality, both legal or both equitable.

4. *SAME—limitation.* The rule does not apply when the words lawful issue, sons, or children, are used, instead of the word "*heirs*," because those words are regarded as words of purchase, and not of limitation; and the ancestor, when such words are used, will take only a life estate, and his sons and children will take by purchase, or under the will, for the reason that they are a designation of persons to take originally in their own right. When taking in character of heir, he must take in quality of heir, that is by descent.

5. *WILL—devise—rule in Shelly's case applied.* A testator, by the terms of his will, devised to his daughter one-third of all his property left after the payment of debts, with the following limitation: "and it is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education, until she is twenty-three years of age, after which she may come into possession of the full amount of rents and profits, the principal to descend to her heirs." *Held*, that the rule in Shelly's case was applicable to such devise, and by it the daughter took an estate of inheritance in fee simple in one-third of the lands of the testator left after the payment of debts.

6. *SAME—rule not affected by a power of sale.* And the fact that a mere naked power was given to the executors to sell certain town lots upon a certain contingency, where no trust was created, was held not to affect the application of the rule.

7. *CONTINUANCE.* Where a complainant made a substantial amendment to her bill, the defendant moved for a continuance on that ground, which the court overruled: *Held*, on appeal, when it appeared that the cause was afterward continued by the expiration of the term, that the error did no injury, and furnished no ground of reversal.

8. *PARTIES in chancery—wife of mortgagor on foreclosure.* On bill to foreclose a mortgage executed by a husband alone to secure the payment of purchase money, his wife is neither a necessary nor proper party defendant.

Syllabus. Opinion of the Court.

9. **FORECLOSURE—decree for possession.** A decree for the foreclosure of a mortgage, among other things, provided that if the premises, in case of sale, were not redeemed in fifteen months, the master in chancery execute a deed to the holder of the certificate of purchase, and requiring the delivery of possession to the grantee in such deed : *Held*, no error.

10. **SAME—interest.** When a personal decree is rendered against a mortgagor for the balance of the debt remaining after the sale of the mortgaged premises, with interest, if the proceeds of sale shall not extinguish the interest accrued on the original debt, the court should see that interest is not allowed on interest.

APPEAL from the Circuit Court of Stephenson County ; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. A. CRAIN, for the appellants.

Mr. HENRY C. HYDE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

The determination of this cause depends upon the effect of the terms used in the will of Orestes H. Wright, which are as follows :

“ After all my honest debts are paid, it is my desire that what property is left should be shared equally between my dear and lovely wife, Mary M. Wright, and my dear children, each one-third ; that my wife shall retain her third till her death, and then it shall descend to her natural children ; and it is my wish that both of my children shall receive a good moral education, which shall be paid out of the rents or interest of property, or dividends of profits of railroad-stock, so that the principal shall not be diminished, as there will be amply sufficient. Should my son William be a steady, sober, and industrious young man, as I hope and pray he will be, it is my wish that he should have the rents and profits of his share of the estate after he is twenty-one years old, until he arrives at twenty-five years of age, and then to come into full possession of the principal, and not before ; but should he not be a temperate, sober man, it is my desire that it be so fixed, that he shall receive, year by year, the profits only, and that the principal descend to his heirs ; and

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it is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education, until she is twenty-three years of age, after which she may come into possession of the full amount of rents and profits, the principal to descend to her heirs. It is my desire that my executors and the guardian should consult the best interest and welfare of my wife and children in the management of the estate, and use their best discretion."

Mary Sophia, the devisee named in the above clause, intermarried with John Scott, and they, on the 21st day of March, 1868, executed to Frederick Baker, one of the appellants, a deed, in consideration of the sum of eight hundred and seventy-five dollars, for one of the tracts of land of which her father, O. H. Wright, died seized, and which had been set off and allotted to her in certain partition proceedings instituted by her against the widow, Mrs. Wright, and her brother, William, she claiming the fee therein. To secure the payment of six hundred and seventy-five dollars, part of the purchase money, Baker executed his two notes, and a mortgage on the land.

The notes not being paid, Mary S. Scott filed her bill in chancery to foreclose the mortgage, and for a decree that the land be sold, and that Clarinda Baker may be barred of dower.

The defendant Frederick Baker, answered, admitting the execution and delivery of the notes and mortgage as set forth in the bill, and alleges that he purchased the land, the consideration money expressed in the deed being its full value, and paid in cash two hundred dollars, and received a conveyance in fee, with the usual covenants of warranty, from complainant and her husband, and then alleges, that complainant deriving her title to the land through the devise of her father, she took, by that devise, a life estate only in the land; and her conveyance to the defendant carried that estate only to him, and that he should be compelled to pay on the notes and mortgage the present value of the estate so vested in the complainant at the time of her conveyance, deducting therefrom the purchase money paid, and alleging that such present value, after such deduction,

Opinion of the Court.

left nothing due on the notes and mortgage. The defendant also filed a cross-bill, alleging in substance the same facts, and praying the cancellation of the notes and discharge of the mortgage.

In answer to the cross-bill, complainant admitted all the material allegations of the same, except that part of it which claimed for her a life estate by the will, she insisting that by the terms of the devise the fee was vested in her.

The court decided complainant had a fee simple in the land, under and by virtue of the devise, and decreed a sale of the premises to satisfy the notes and mortgage.

To reverse this decree the defendants appeal, and contend that, by the devise, a life estate only was vested in complainant. Appellee contends that the words used in the will fall within the rule in *Shelly's* case; and that is the question before us. Another point is made by appellants, and that is, if the devise is within the rule in *Shelly's* case, that rule is not in force in this State.

The first point to be settled is, what is the rule in *Shelly's* case?

That case arose in the twenty-third year of the reign of Elizabeth, about the year 1579, near three hundred years ago, and is reported in 1 Coke's Rep. side paging 93 b., wherein, among other rulings, it was held, where the ancestor takes an estate of freehold, and in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs, either in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase.

Preston, in his elaborate treatise on "Estates," devotes a chapter of near two hundred pages, to a critical and searching analysis of this rule, and says the rule may be thus expressed: First. When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterward, in the same deed, will, or writing, there is a limitation by way of remainder, with, or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body,

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by that name in deeds or writings of conveyance, and by that, or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation.

He expresses the rule secondly, thus: Whenever the ancestor takes an estate of freehold, or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed in possession, in the ancestor so taking the freehold, and, therefore, is not contingent or in abeyance.

A third, and still more accurate expression of the rule is, as we have stated it at the outset, taken from the ruling of the court, as found in the reported case.

The author further says, this rule has been expressed with greater precision by one of the very able counsel, Sergeant Glynn, in *Perrin v. Blake*, to be "in any instrument if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body he takes a fee tail; if to his heirs, a fee simple." 1 Preston on Estates, 263, 4, 5.

This rule is venerable for its antiquity, having received the sanction of the highest courts in England as far back as the 18 of Edward II., and is based on their authority, as found in the year books of that and subsequent reigns.

This we gather from the able argument of Mr. Justice Blackstone, in the opinion delivered by him in the Court of Exchequer, in the celebrated case of *Perrin et al. v. Blake*, first reported in 4 Burrow, 2579, but more fully in 3 Greenleaf Cruise on Real Property, 313.

That was a case arising under the will of William Williams, and the question arose upon a demurrer to a replication in an action of trespass. It was there held by three judges against one, that the legal operation of the word heirs, as a limitation, might be controlled by the manifest intent of the testator, and be construed into the description of a purchaser.

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In the will in question was this clause, "It is my intent that none of my children shall sell his estate for longer than his life, and to that intent, he gives all his estate to his said son, John, and said infant for their lives, remainder to trustees to preserve contingent remainders, remainder to the heirs of the bodies of his said sons," etc.

Three of the judges held that "heirs" must be construed a word of description, and the heir would take the inheritance as a purchaser, and, therefore, John took only an estate for life.

On a writ of error to the Exchequer chamber the case was there elaborately argued, and six of the seven judges concurred in overruling the judgment of the King's Bench, giving full effect to the rule in *Shelly's case*.

It was on that occasion the able and elaborate argument of Mr. Justice Blackstone was delivered. The suit was pending more than thirty years, the judges giving their opinions *seriatim* on the 29th of January, 1772, more than one hundred years ago. This case was taken to the House of Lords by the defendant. While pending there it was compromised.

The leading question in the case, for no one disputed or doubted the rule in *Shelly's case*, was, "Whether a testator's manifest intent might control the legal operation of the word heirs as a limitation?"

Even Justice Blackstone, in delivering his opinion, said he agreed with the King's Bench that if the intent of the testator manifestly and certainly appeared by plain expression, or necessary implication from other parts of the will, that the heirs of the body of A should take by purchase, and not by descent, then a devise to A for life, and after his decease to the heirs of his body, not only might, but must, be construed an estate in strict settlement; but he thought it did not manifestly and certainly appear from the mere intended restraint of the power of alienation in A, that the testator had meant that the heirs of A's body should take by purchase and not by de-

Opinion of the Court.

scent, or even that he knew the difference between the two methods of taking.

But it was held by seven judges of the Exchequer, Justice Blackstone concurring, against one, and has been uniformly so held since, that the rule in Shelly's case was not a rule of interpretation, but an inflexible rule of property; and that in all cases of devises of legal estates whenever lands are given to a person for life, or for any greater estate, with an immediate remainder to the heirs or heirs of the body of such devisee, the word "heirs," or the words "heirs of the body," shall operate as words of limitation, and give the devisee an estate in fee simple or in tail.

As we understand, one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance. The rule, therefore, is only applied to those limitations in which the word "heirs" is used, on account of the maxim that *nemo est hæres viventis*. But the rule does not apply when the words lawful issue, issue, sons, or children are used instead of heirs. These words are regarded as words of purchase, and not of limitation, and the ancestor, therefore, would take only a life estate, and his sons or children would take by purchase, for the reason that they are a designation of persons to take originally in their own right. But when the limitation is to the heirs, it is, in legal intendment, as a class or denomination of persons to take in succession from generation to generation. 1 Prest. on Estates 265.

As Lord Thurlow said, in *Brown vs. Morgan*, 1 Brown's Ch. R. 216, when the heir takes in the character of heir, he must take in quality of heir, and all heirs taking as heirs must take by descent. Since the solemn determination in *Perrin v. Blake*, in the Exchequer, the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. 2 Jarman on Wills 243, side paging.

The requisites of the rule are, that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs or heirs of the body of the person

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taking that estate, by that name, and not the heirs as meaning or explained to be "sons," children, etc.; that these heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor shall both owe their effect to the same deed, will, or writing; and that the several limitations shall give interests of the same quality, both legal or both equitable. 1 *Prest. on Estates*, 266.

Testing the devise in this case by these requisites, no one will deny it fulfills them all.

A life estate is devised to Mary Sophia. That is an estate of freehold, though not of inheritance. 1 *Wash. Real Property* 88; 4 *Kent's Com.* 23, 24. "The principal to descend to her heirs"—they are named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or so that the estate to arise from the limitation to the heirs and the estate of freehold in Mary Sophia, both owe their effect to the same will, and that the several limitations give interests of the same quality, and both of them legal, there is no dispute.

That this rule was part of the common law of England, and an established axiom in the law of real property in that realm for near five hundred years, is not, and can not be denied. 4 *Kent's Com.* 243.

That it is law here, what more authoritative can be found than the Act of our General Assembly?

"The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law, prior to the fourth year of the reign of King James the first, excepting the second section of the sixth chapter of 43 Elizabeth; the eighth chapter of 13 Elizabeth; and ninth chapter of 37 Henry VIII., and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

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This law was enacted in 1845, having been first substantially enacted in 1819, and re-enacted in 1829, and again re-enacted in 1833, in the revision of that year.

Here is an emphatic declaration of the people, speaking through their representatives in the General Assembly, that "the common law of England, so far as the same is applicable, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority."

Counsel for appellants quote from *Boyer v. Sweet*, 3 Scam. 120, remarks made by the Court on the extent to which the common law was adopted in this State, to all which we yield our cordial assent; but the question there was not in relation to a rule of property, but a rule of evidence, which evidence was, by the common law, admissible as the best evidence of which the nature of the case was susceptible, rendering the remarks themselves, perhaps, unnecessary. Reference is also made to the case of *Penny v. Little et al.* Id. 301, where the force of the common law was barely alluded to in connection with a question of remedy on a claim for rent. Nothing said in either case disturbs the fact, that the common law of England, in all cases, when not repealed or altered by legislative authority, is in full force in this State.

The only question then must be, is this rule, which is admitted to be a rule of property of the common law, applicable to our condition, to the genius and spirit of our institutions, and to their purposes and objects?

It is said by some courts, and of great respectability, that the rule was established by the courts of England in subserviency to the feudal policy prevailing at the time, and to the interest of the lords, whose feudal rights of relief, wardship, marriage, etc., would attach upon an estate devolving by descent, but would not attach upon a transmission by purchase. *Turman v. White's heirs*, 14 B. Mon. 560, 570.

Mr. Justice Blackstone, in his opinion in *Perrin v. Blake*, says, that in no feudal writer did he ever find a single trace of just reason assigned. He was inclined to believe the rule was first established to prevent the inheritance from being in abey-

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ance. He says, one principal foundation for it was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance; and another foundation might be, and probably was, laid in a principle diametrically opposed to the genius of the feudal institutions, namely: a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. In support of this view, he cited from the year books the first case in which, as he believed, the principle of the rule in *Shelly's* case was established. It was in 18 Edward II. He concluded that the rule was of the highest antiquity, not merely grounded upon any narrow feudal principle, but applied, in the very first instance of which we have any knowledge, to the liberal and conscientious purpose of facilitating the alienation of land, by charging it with the debt of the ancestor. 1 *Fearne on Rem.* 85, 86; 1 *Hargrave's Law Tracts*, 499, 500.

If the rule was entirely of feudal origin, it is not, on that account, less binding on courts of justice, nor its authority the least diminished for that reason.

The same learned judge said: "There is hardly an ancient rule of real property but what had in it more or less of a feudal tincture; but whatever their parentage, they are now adopted by the common law of England, incorporated into its body, and so interwoven into its policy, that no court of justice in the kingdom had either the power or, he trusted, inclination to disturb them."

It has become a rule of property, and is, we believe, in harmony with the genius of our institutions, and with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate, and has challenged and received the willing obedience and support of the most able minds of England and the United States.

How many estates may be depending in this State upon this rule, we can only conjecture, that there are very many there can be no doubt, which an arbitrary declaration by this court,

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of the inapplicability of the rule to our institutions, would unsettle and destroy. The courts of every State of this great union in which the common law has been adopted, have, without exception, upheld this rule, and guided their decisions by it. In some of them it has been abolished by statute in regard to wills; in others, both as to deeds and wills. A list of them will be found in 2 Washb. Real Prop. 563, top paging in note. This State is not one of them.

It is however intimated by appellants, that the effect of section 13 of the conveyance act, R. S. 1845, chap. 24, p. 105, is to abolish this rule. That section is as follows: "Every estate in lands which shall be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law."

Before the passage of this act it was the law, that in a grant or conveyance, or devise, the word "heirs," or an equivalent word, was necessary to transmit the inheritance. By the omission of such word a life estate only was created. Now if such word be omitted the fee passes to the grantee and is transmissible to his heirs, if a less estate is not limited by express words, or do not appear to have been granted, conveyed, or devised, by construction or operation of law.

In this case there is no less estate limited by express words to Mary, nor does a less estate appear to have been granted or devised by construction or operation of law, but the contrary, for by construction and operation of law a greater estate is devised under the operation of the rule in Shelly's case. The devise to Mary is of one-third of his estate, with no express words limiting it to an estate for life. Then comes the provision making it descendible to her heirs. The devise is a freehold estate for life, though not so created by express words, and by construction of law, the remainder vests in the owner of the life estate.

If this section be intelligible, it is authority as well for
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the operation of the rule in Shelly's case as for its repeal. Had the legislature designed to abolish that rule they would have done so in express terms easily understood.

As by section 6 of the same chapter the rule does not operate upon estates tail, as it declares, contrary to the rule in Shelly's case, that the first devisee or grantee of an estate tail shall take only for life and the remainder to pass in fee to the person or persons to whom the estate tail would, by common law, next pass after the death of the first grantee or devisee, the inference is, no change was intended to be made in the rule where by the deed or will the remainder is limited in fee.

The rule in Shelly's case having been acknowledged as a rule of property by the common law, from the time of Edward II., now near five hundred years, and though admitted to interfere in many cases with the presumed, and in some others with the declared, intention of the parties to the instrument to which it is applied, yet so strong has been the devotion of the courts to the common law that no court has yet been found bold enough to refuse its application in every proper case. We confess we have not the courage to do it. We dare not enter that edifice, consecrated by ages, and with rude hand hew down any one of its pillars.

We deem it useless labor to refer to and comment on the many cases cited by counsel in their argument. It is sufficient to say no reference is made to any case where the rule has been denied application.

Counsel for appellants cites *Jones et al. v. Bramblet et al.*, 1 Scam. 276, as bearing on this question. A reference to the case shows that this question was not in it or alluded to in the most distant manner.

We are also reminded that this court in *Seeley v. Peters*, 5 Gilm. 130, held the common law requiring the owner of cattle, hogs, etc., to keep them upon his own land, has never been in force in this State.

That rule was adapted to a densely populated country like England, but not applicable to a sparsely settled country

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possessed of boundless feeding grounds for cattle. The court, therefore, say that law was not applicable to such a state of things.

The same can not be said of this rule, as we have shown.

It is but just, however, in quoting what was said in *Perrin v. Blake*, to consider the views presented by Lord Mansfield, who concurred with the majority of the Court of King's Bench, and of Mr. Justice Yates, who dissented.

Mr. Justice Yates, who was in the minority, in his dissenting opinion allowed full scope to the intention to be collected from the whole scheme and design of the testator, but he insisted that intention must be manifestly clear and likewise consistent with every rule of law; and he said after you have fixed the intention it then becomes a question whether such intention can be executed consistently with the established rules of law, and if it can not he thought we had better adhere to the law and let a thousand testator's wills be overthrown.

He maintained that in every devise of a legal estate the construction should be agreeable to the legal rules of construction, and thought the rule laid down in *Shelly's* case was one of them. He argued, as wills were to be construed according to the intention of the testator, so far as it was consistent with the rules of law, it was necessary to the safety and certainty of rules of property not to allow a testator to do that which was illegal. These established rules of construction formed, he said, the barriers which kept off uncertainty and vexatious litigations of disputed titles; and this certainty, so desirable, could no longer exist, than whilst the courts adhered to established rules of construction.

He said, these technical expressions were the measures of property in legal devises, and the law having fixed a determinate meaning to them, will not permit their sense to be perverted, but directs the judges ever to adhere to them, without the smallest departure.

Lord Mansfield said the rule was clear law, but was not a general proposition subject to no control, as when a testator's

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intention was manifest on the other side, and when the objections might be answered. He found no cases in Brooke or Fitzherbert where these matters had come in question, so that the judges were agreed that the intention was to govern, and that Shelly's case did not constitute a decisive, uncontrollable rule. He admitted there was a devise to John Williams for life, and in the same will a devise to the heirs of his body, and he agreed that this was within the rule in Shelly's case; but his opinion was, that the intention being clear beyond doubt to give an estate for life to John Williams, and an inheritance successively to be taken by the heirs of his body, and his intention being consistent with the rules of law, it should be complied with, in contradiction to the legal sense of the words used by the testator so unguardedly and ignorantly.

So Justice Blackstone, in addition to what we have already quoted from his able opinion in overruling this judgment of the King's Bench, admitted that the great and fundamental maxim upon which the construction of every devise must depend was that the intention of the testator should be fully and punctually observed so far as the same was consistent with the established rules of law, and no further. He says there are some rules which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law deduced by legal reasoning from some or other of the great fundamental principles, such as that a devise to a man for life, with remainder to the heirs of his body, shall constitute an estate tail. The rule in Shelly's case is not to be reckoned among the great fundamental principles of juridical policy, which can not be exceeded or transgressed by any intention of the testator, but is of a more flexible nature, and admits of many exceptions; for if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. The question is not whether the testator intended that his son John should have a power of alienation, for he most clearly expressed that the son should not have

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such a power; the question is not whether the testator intended his son should have only an estate for life, for he believed there never was an instance where an estate for life was expressly devised to the first taker that the deviser intended he should have any more. But if he afterward gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention, and vests a remainder in the ancestors; and, therefore, it has frequently been adjudged that though an estate be devised to a man for his life, or for his life *et non aliter*, or with any other restrictive expressions, yet if there be afterward added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former, and make him tenant in tail or in fee. The true question of intent would turn not upon the quantity of estate intended to be given to John, the ancestor, but upon the nature of the estate intended to be given to the heirs of his body.

That the ancestor was intended to take an estate for life, was certain; that his heirs were intended to take after him, was equally certain; but how those heirs were intended to take, whether as descendants or purchasers, was the question. If the testator intended they should take as purchasers, then John, the ancestor, only remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question, therefore, was, whether the testator had or had not plainly declared his intent that the heirs of the body of John Williams should take an estate by purchase, entirely detached from and unconnected with the estate of their ancestor? Or, in other words, whether he meant to put an express negative on the general rule of law, which vests in the person of the ancestor, when tenant of the freehold, an estate that is given to the heirs of his body? It was not incumbent on the plaintiff to show, by any express evidence, that his ancestor meant to adhere to the rule of law, for that was always supposed till the contrary was clearly proved; but

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it was incumbent on the defendant to show, by plain and manifest indications, that the testator intended to deviate from the general rule, for that was never supposed till made out—not by conjecture, but by strong and conclusive evidence.

Applying these principles to the devise in question, can there be any doubt that the testator intended to give to the heirs of Mary the fee, and as the descendants of his daughter and not as purchasers. We think there can be no doubt on this point, and the principles above cited apply with full force.

But upon a careful examination of the devise, taken in connection with our statute above cited (Sec. 13, Ch. 24), Mary took a fee in one undivided one-third of the real estate. The clause is: "After all my honest debts are paid, it is my desire that what property is left should be shared equally between my dear and lovely wife, Mary M. Wright, and my dear children—each one third."

Appellants contend that although this devise, standing by itself, would take the fee, yet a subsequent clause limits her to a life-estate. That clause is: "And it is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education until she is twenty-three years of age, after which she may come into possession of the full amount of the rents and profits, the principal to descend to her heirs."

We have argued the case on the admission that the clauses taken together limited the estate of Mary to a life estate; but, as the remainder was devised to her heirs we have discussed the case as coming within the rule in Shelly's case, and we will pursue the argument no further.

Appellants contend that where the testator has created an executory trust the rule does not apply. This is admitted, and the authority for it is to be found in 4 Kent's Com. 218; 2 Washb. on Real Prop. 557, top paging. This is understood to be such executory trusts as arise under a marriage settlement; they will not be held to come within the rule when such is not the intention of the parties.

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The executory trust assumed to be created by this will is found in this clause :

“Should the loose property and collection of my debts not be sufficient to pay all my debts, it is my desire that so many town lots be sold, on not more than one year’s time, as will be sufficient to settle my debts. It is also my desire that the village lots may be sold from time to time, so as not to hinder the growth of the village, if my executors think it best for the estate ; also, should they think best to sell any of the unimproved land, it is my desire that they should do so and invest the avails of the lots and land in the Galena & Chicago Union Railroad stock, if possible.”

It is very apparent no trust whatever is here created. A mere naked power to sell is given to the executors, in a certain contingency.

There are some minor points made by appellants which do not touch the merits of the case, and in which we can perceive no error.

The first is, the court overruled the defendant’s motion for a continuance, which he claimed as consequent upon a substantial amendment to the bill.

This can not now be complained of, as a continuance was had by the expiration of the term. Appellant thereby had all the benefit of his motion.

The second is, that the court erred in overruling the defendants’ demurrer, as to the defendant, Clarinda Baker. As the mortgage was given for the purchase money, the wife of Frederick Baker, the grantee in the deed from Mary Scott and her husband, had no dower in the land, and she was not a necessary party to the bill. Making her a party, which appears to have been done out of abundant caution, was improper, and her demurrer should have been allowed and she dismissed from the cause. The record does not show she was formally dismissed, but no subsequent proceedings were had against her. The costs of this demurrer should not be taxed against appellants, but against appellee ; and in this particular, the decree will be modified.

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The fourth error assigned is in receiving depositions by the master in chancery of certain witnesses. No specific objections to the depositions are pointed out, and, for aught we know, the testimony contained in them was relevant and important.

Another error assigned is in awarding a writ of possession before the confirmation of the master's report. The clause of the decree in this respect is as follows: That upon the expiration of fifteen months after the day of sale, if the land so sold shall not have been redeemed as provided by law, upon the production to the then acting master in chancery of this county of the certificate of purchase aforesaid, by the purchaser or purchasers, their heirs or assigns, that said master make, execute, and deliver to such holder of said certificate a good and sufficient conveyance in fee simple of said premises, or such part thereof as may have been sold; that upon the execution of the conveyance aforesaid the grantee or grantees in such master's deed have possession of said premises and that any of the parties to this cause who shall be in possession of said premises or any part thereof, and any person who may have come into possession under them, or either of them, since the commencement of this suit, deliver possession and surrender said premises to the grantee or grantees aforesaid upon production of such deed of conveyance.

The form of this decree in this respect is common to all the courts of this state exercising chancery powers, so far as we are advised. In *Aldrich v. Sharp*, 3 Scam. 261, this court said: When the decree contains no order for the surrender of the possession to the purchaser, the court on motion will make such order; and upon notice thereof to the party in possession, and demand of possession, the court will order an injunction against the party to deliver possession, and on affidavit that the same has been served, and the refusal is persisted in, a writ of assistance will issue to the sheriff to put the purchaser in possession, on his motion and without notice.

In *Lawrence v. Lane*, 4. Gilm. 354, it was said, the common practice in the courts of chancery in this and many other of

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the United States, upon the foreclosure of mortgages, is to decree a surrender of the possession and title papers by the mortgagor and those claiming under him.

It is only inferentially that we can understand the decree required a report of the sale to be made by the master, but if it was his duty so to report, we must presume the master performed it to the satisfaction of the court, and that objections to the report were then and there made, if any existed, to it. It is not a reasonable presumption the master would give a certificate of sale and a deed, had not the court approved his report.

It is also complained by appellants that this portion of the decree is erroneous: "And it is further ordered, adjudged, and decreed that if the moneys arising from such sale shall be insufficient to pay the amount so due, etc., with the interest, costs, and expenses of sale, said master shall specify the amount of such deficiency in his report of sale, and on the coming in and confirmation of the report, the defendant Frederick Baker, who is personally liable for the payment of the debt secured by said mortgage, pay to the complainant the amount of such deficiency with interest thereon from the date of said last mentioned report, and that said complainant have execution therefor."

This kind of decree is authorized by the act of February 16, 1865, Sess. Laws, 1865, p. 36, and the court in pronouncing it very reasonably presumed the premises, when sold, would fetch at least the interest which had accrued on the decree.

Should the master report they did not, on sale, fetch the interest, and application is made for an execution to collect the balance, the court in ordering an execution would order and direct that the interest should not be compounded.

It is barely possible a case may arise wherein, upon a sale, the property sold may not fetch the interest which has accrued upon the decree. In this case it is not shown or pretended that any injury has accrued to appellants by the decree as it stands, nor can we perceive that any wrong or injustice is to be the consequence.

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With the modification made as to the costs of the demurrer of Clarinda Baker, and the order to the circuit court on directing an execution, if one be applied for, that compound interest shall not be computed, the decree is affirmed.

Decree affirmed.

EDWIN LEE BROWN *et al.*

v.

CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*party applying for judgment.* The authority of a city collector to apply for judgment on special assessments is abrogated by the new constitution.

2. SAME—*certificate of publication of notice.* Where the certificate of publication of notice of the meeting of commissioners to make the assessment under an ordinance fails to state the date of the last paper containing the notice, or any thing from which it can be inferred, the defect will be fatal to the judgment, on error.

APPEAL from the Superior Court of Cook County.

Per CURIAM: This is an appeal from a judgment of the Superior Court of Cook County, rendered at the March term, 1871, upon the application of the collector of the city of Chicago, upon a special assessment warrant for the opening or extension of Franklin Street, in said city.

Two errors are assigned, each of which is fatal. First, that the authority of the collector to apply for judgment was abrogated by the new constitution. Second, the certificate of publication of notice of meeting of commissioners to make the assessment, fails to state the date of the last paper containing the notice, or any thing from which it can be inferred.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Opinion of the Court.

JOHN H. WICKER

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v.

ROMINE V. HOTCHKISS.

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52a	37

MALICIOUS PROSECUTION—*of the want of probable cause.* Where a party procured an indictment to be found against another, it was *held*, in an action for malicious prosecution against him, that, if in so doing he acted under the advice of counsel, after having communicated to such counsel all the facts bearing upon the guilt or innocence of the accused, of which he had knowledge, or could, by reasonable diligence have ascertained, the advice thus given was a protection against such prosecution.

APPEAL from the Circuit Court of Cook County ; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. GOUDY & CHANDLER, and Mr. E. W. EVANS, for the appellant.

Messrs. E. & A. VAN BUREN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This was an action on the case for malicious prosecution. The *gravamen* is the procurement of an indictment for larceny, maliciously and without probable cause ; and the consequence the arrest and imprisonment.

There must be proof of both malice and of want of probable cause, to render the party liable in this action.

If there was probable cause for procuring the indictment, there can be no liability upon the defendant ; and if he communicated to counsel all the facts, bearing upon the guilt or innocence of the accused, of which he had knowledge, or could by reasonable diligence have ascertained, he ought not to be compelled to respond to the large verdict for \$15,000.

Was there probable cause for the prosecution ?

The receipt, signed by the plaintiff and read upon the trial, was conclusive evidence that the defendant owned the cattle at the time they were shipped to Chicago, if there was no proof

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to explain it. The letter of January 22, 1867, does not change the effect of the receipt. The latter expressly acknowledged the cattle to belong to Wicker, and Hotchkiss agreed to fatten them at his own expense; and when they were sold, Wicker was to be paid a fixed sum, with ten per cent interest thereon, and out of the proceeds of the sale all necessary expenses of transportation, etc., were to be paid, and the overplus, if any, was to be paid to Hotchkiss. His interest was entirely contingent. If the sale was not for a good price, he had none.

Hotchkiss was exceedingly anxious to contract the cattle at a figure which would leave a surplus for him, and for this purpose he evidently wrote to Wicker, and received the reply of January 22d. He testified that it was a reply to one he had written on the 19th of January, which was not introduced. The subsequent letters of Hotchkiss confirm the only construction which can be given to the receipt. He expresses anxiety to have the cattle contracted, so that he can obtain money to purchase corn; begs Wicker to come and see them; asks for a copy of the receipt; says that he can sell for about seventy dollars a yoke for work cattle; and with Wicker's consent will sell a few.

Why did he wish any consent if he had the right to dispose of them? The consent was not given; and immediately after the failure to consummate an agreement with Wicker to fix a price upon the cattle, or to procure an advance of money from him, he wrote three letters, without date, complaining of a disease of the skin, which had appeared upon the cattle; that some of them were losing fifteen or twenty pounds per week; and yet, in a letter of January 30th, evidently a short time previous to the letters without date, he spoke of the cattle as having done better than any he ever fed, and that he could make them the best cattle which had been shipped from the county. There was matter in these letters calculated to rouse the suspicion of any man.

What followed? Hotchkiss drove thirty-two head of the cattle to a station further from Chicago than the station on the railroad usual for shipment from his neighborhood;

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shipped them in the night; and sold them in Chicago without the knowledge or consent of Wicker, and appropriated the proceeds of the sale to his own use.

Such were the facts known to Wicker when the prosecution was instituted. The proof, upon the trial, developed some circumstances which might somewhat relieve the conduct of Hotchkiss, but they were unknown to Wicker at the time the indictment was procured.

Wicker knew that he owned the cattle; that Hotchkiss had agreed to feed them until the 1st of May; that the receipt contained an acknowledgment of Wicker's right to sell; and when he ascertained that a sale had been made, under such circumstances, before the expiration of the time for which the cattle were to be fed—and secretly and without any communication with him—a strong suspicion would not only be aroused, but an honest belief created that the party was guilty of crime. There was reasonable ground for belief of guilt; and there can not be any liability in an action for malicious prosecution.

Did the prosecutor submit to counsel all the facts within his knowledge, capable of proof, or which he might have known by the exercise of reasonable diligence, and did he act in good faith upon the advice given?

The testimony of Mr. Reed, the State's attorney of Cook County, was, substantially, that Mr. Evans, an attorney of this court, and the prosecutor, came to his office and communicated to him the facts about the shipment of the cattle at an unusual station, in the night time; that Hotchkiss had been employed to feed them; that he had no interest in them and was to be paid for his services; that he had sold them in Chicago without the knowledge or consent of the prosecutor; and then the receipt was shown; and Mr. Reed stated that he thought the party was guilty of larceny.

Counsel for appellee urge that material facts were withheld from the counsel, and that absolute falsehoods were stated.

The facts alleged to have been withheld were some arrangements with one Miller, months prior to the date of the

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receipt, to feed the cattle, and the purchase of some of them, by Hotchkiss, from another person. All former agreements about the cattle and rights in them were merged in the receipt. Hotchkiss could not go behind his own written acknowledgment of the ownership of Wicker.

The falsehood charged consists in the statement made to Mr. Reed, that Hotchkiss was not a partner and had no interest in the cattle. Immediately following this statement the receipt was produced, and the counsel remarked, "By this I see that he is not a partner." The entire evidence of any interest of Hotchkiss was embodied in the receipt, and in the production of that the prosecutor discharged his whole duty and disclosed all that he could possibly know.

We think there was a full disclosure of all the facts known, or which, in the exercise of common prudence, might have been known, and that the advice given is a protection against this prosecution. *Ross v. Innis*, 26 Ill. 259; *Same v. Same*, 35 Ill. 487; *Walter v. Sample*, 25 Penn. 275.

Counsel for appellee have argued the case as though it was an action for abuse of legal process, or for an arrest for the purpose of extorting money. Such is not the character of the declaration. In such actions it has been held that it is not necessary to prove malice or want of probable cause, for the law will imply both. *Prough v. Entriken*, 11 Penn. 81; *Page v. Cushing*, 38 Maine, 523.

There is evidence, in this record, upon which to base the inference of a most oppressive and outrageous abuse of the criminal process for the extortion of money; but this will not make out the cause of action alleged in the declaration.

Counts might be framed to meet this evidence; but in the view we take of this declaration, and the facts necessary to sustain it, we are compelled to reverse the judgment.

The abstract of appellant is not in accordance with the rules of court; is to some extent unfair and incomplete; and the costs of it must be taxed against appellant.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Statement of the Case.

JEFFERSON MUNSON, use, etc.

v.

ROSWELL C. NICHOLS.

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56a 396
58a 17962 111
210 220

1. FRAUD AND CIRCUMVENTION—*in obtaining the execution of a promissory note.* In an action on a promissory note by an assignee thereof before maturity against the maker, the defendant filed a plea, which disclosed facts showing that by an artifice of the payee of the note the defendant was induced to sign it as one payable absolutely, under the belief that he was signing another one of a different character, payable only on a contingency: *Held*, that such facts constituted fraud, not merely in relation to the contract or consideration of the note, but such fraud and circumvention in obtaining its execution as, under the statute, was pleadable in bar to any action on the note by any assignee.

2. SAME—*of the negligence of the maker, and whether it may be urged on demurrer to a plea.* Nor could it be urged as matter of law on demurrer to such a plea that it disclosed facts showing such negligence on the part of the payee in executing the note and allowing it to go into circulation as avoided the defense. That would be a question of fact for the jury to determine.

WRIT OF ERROR to the Circuit Court of Kankakee County; the Hon. CHARLES H. WOOD, Judge, presiding.

This was an action of assumpsit brought by Jefferson Munson, who sued for the use of Christopher C. Robinson, against Roswell C. Nichols, upon a promissory note executed by Nichols, March 23, 1868, payable one year after the date thereof, to H. Burbank, or bearer, and assigned to Munson, June 30, 1868.

To the declaration filed in the cause the defendant filed five pleas, the following being the last in the series:

And for a further plea in this behalf the defendant says *actio non*, because he says that the execution of said promissory note sued upon in the first count of said plaintiff's declaration was obtained by the said H. Burbank, the payee of said note, by fraud and circumvention; that the said H. Burbank caused the defendant to purchase an interest in a certain patent right, known as "Elliott's Improved Hay Loading Device," in and for the towns of Kankakee, Bourbonnais, and

Statement of the case.

Limestone, in said Kankakee County ; and to make such sale to the defendant of an interest in said patent right, the said H. Burbank came to defendant while he was husking corn on his farm in said town of Limestone ; that said Burbank falsely pretended to defendant that Otis Durfee, the brother-in-law of defendant had sent him, the said Burbank, to defendant with a request that defendant should purchase an interest in said patent right, and that the said H. Burbank then and there said to defendant, that if he would purchase an interest in said patent right in the towns aforesaid, he, the said Burbank, would take in payment for the same the note of the defendant for the sum of ninety dollars, payable when the said defendant should realize from the sale of said hay loading device an amount equal to the face of said note, with interest at ten per cent from date. And the defendant avers that he was induced by the said Burbank upon his representations and offer aforesaid to purchase an interest in said patent right in the towns aforesaid, the said defendant then and there accepting the offer of said Burbank aforesaid. And defendant further avers that the said Burbank did then and there show to the defendant a printed blank note, containing the express condition printed in the same, that the said note was payable when the defendant should realize an amount equal to the face of the note from sales of said hay loading devices, and the said Burbank said he would fill up said blank note, after which the defendant was to sign the same. And the defendant further says that said Burbank then and there, in said corn field, pretended to place said blank note containing the conditional payment of the same as aforesaid, upon a memorandum book, held by him, the said Burbank, when and where the said Burbank pretended to fill up the blanks in said blank note, in pursuance of and agreeably to the agreement between the said Burbank and the defendant in the sale and purchase of said patent right as aforesaid. And the defendant further says said Burbank so held said memorandum book while he was pretending to fill up said blank note that defendant could not see or observe the particular movements

Statement of the case.

of said Burbank, and that as soon as the said Burbank had finished filling up the said blanks, he looked with sudden and marked interest toward the public highway where the said Burbank had left his team of horses and carriage, and falsely and fraudulently expressed his great alarm lest his team should run away, as he had forgotten to hitch the said team of horses, and urgently requested defendant to sign the note so filled up by said Burbank, in great haste, so that he, the said Burbank, might reach his team before they ran away. And the defendant further says that he did sign the note filled up by said Burbank; that said note was signed by the defendant on the memorandum book held by said Burbank; that the defendant, to comply with the urgent request of said Burbank to make haste as aforesaid, only looked at the note filled up to see if the proper amount had been written in the blank. And the defendant says that he supposed he was signing the conditional note aforesaid, and supposed the said Burbank had filled up the blank note shown to defendant as aforesaid, and none other.

And the defendant further avers that said Burbank, fraudulently pretending to fill up said blank note, shown to, and read by defendant as aforesaid, did then and there fraudulently fill up a different note, to-wit: the one sued upon in the first count of said plaintiff's declaration. And defendant further avers, that he, confiding in the common honesty of the said Burbank, and not suspecting that said Burbank had fraudulently substituted the note sued upon in the first count of said declaration, in the place of the blank note read by defendant as aforesaid, signed the said note sued upon in the first count of said declaration, supposing it was the note read by the defendant as aforesaid. And if the defendant had known that the said Burbank had filled up the note sued upon in the first count of the said declaration for him to sign, he, the defendant, would not have executed the same, and the note which he did execute, as appears from the note declared upon, is a different one from the note read by defendant as aforesaid. And this, the defendant is ready to verify, wherefore he prays judgment, etc.

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To this plea, a demurrer interposed by the plaintiff was overruled by the court, and, the plaintiff electing to abide by his demurrer, judgment was rendered in favor of the defendant, to reverse which the plaintiff brings the record to this court.

Mr. W. H. RICHARDSON, and Mr. H. L. RICHARDSON, for the plaintiff in error.

Mr. WILLIAM POTTER, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The error assigned upon this record is, in overruling the demurrer to the fifth plea.

The facts disclosed by the plea show, that by an artifice of the payee of the note, the defendant was induced to execute it as one payable absolutely, under the belief that it was another one of a different character—one payable only on a contingency.

This makes a case, not merely of fraud in relation to the contract or consideration of the note, but of fraud and circumvention in obtaining the making or executing of the note, which, under the eleventh section of the act relative to negotiable instruments, is pleadable in bar to any action brought on the note by any assignee of it.

We think it clearly a case contemplated by the statute. *Woods v. Hynes* 1 Scam. 103; *Mulford v. Shepard*, Id. 583; *Latham v. Smith* 45 Ill. 25.

It can not be said as a matter of law, that the plea shows such negligence on the part of the payee as avoids the defense. It would be a question of fact, for the jury to pass upon and determine, whether the payee was guilty of such negligence in executing the note, and allowing it to go into circulation, as should preclude him from setting up the defense.

Perceiving no error in overruling the demurrer, the judgment is affirmed.

Judgment affirmed.

JOSHUA L. MARSH *et al.*

v.

CITY OF CHICAGO.

1. **SPECIAL ASSESSMENTS**—*application for judgment by one unauthorized.* Since the adoption of the new constitution the collector of the city of Chicago is not authorized to apply for judgment to enforce the collection of special assessments by the city.

2. **SAME**—*notice of application—certificate of publication.* When the certificate of the publication of notice of an application for judgment upon special assessments fails to state the date of the last paper containing the same, it is fatally defective.

APPEAL from the Superior Court of Cook County.

Messrs. SPAFFORD, MCDAID & WILSON, for the appellants.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: In this case the application for judgment was made at the March term, 1871, of the superior court, by the city collector. He was not authorized to make such application after the adoption of the new constitution, *Hills v. Chicago*, 60 Ill. 86, and the judgment must for this reason be reversed.

The certificates of publication of notices are defective, in that they fail to state the date of the last paper containing the same. *Andrews v. City of Chicago*, 57 Ill. 239.

Judgment reversed and cause remanded.

Judgment reversed.

JACOB ZUCKERMAN

v.

ADOLF SONNENSCHNEIN.

1. **SLANDER—MALICE.** The law implies malice from the publication of actionable words, but this implication may be explained and rebutted by the circumstances.

62b	115
41a	543
62	115
Case 2	
107a	486
62	115
Case 2	
113a	450
113a	451

Syllabus. Opinion of the Court.

2. SAME. In a suit for slander it is error to instruct the jury that if the defendant used words imputing a crime, they must find for plaintiff, when the words were spoken under circumstances tending to show a want of malice. In such case the intent of the publication should be left to the jury under the proof.

3. SAME—MALICE. When words imputing the commission of a crime are used by the defendant merely for the purpose of translating the language of another from the German into the English language at the request and for the information of an attorney at law in a matter of business, the law will not infer malice in the defendant. Under such circumstances the use of the words may properly come within the range of privileged communications. If there was malice in fact it must be left to the jury to be found from the evidence.

APPEAL from the Superior Court of Cook County ; the Hon. WM. A. PORTER, Judge, presiding.

The facts sufficiently appear in the opinion of the Court.

Mr. ADOLPH MOSES, for the appellant.

Mr. GEORGE W. BRANDT, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The slanderous words charged are: "He is a robber;" "he is a thief;" "he is a forger;" "he gets notes for ten dollars, and changes them to one hundred dollars."

Some of the words are actionable *per se*; and the law implies malice from the publication of actionable words. This implication, however, may be explained and rebutted by the circumstances.

Brandt, an attorney, had a note for collection against appellant's father. The father and son were both Germans; and the father was unable to converse in the English language. They were together in Brandt's office, at his request, to talk about the note. The slanderous words were then used in the hearing of Brandt, Higby and Hoffman, all attorneys at law, in the same office.

The plaintiff in the suit below obtained his information of

Opinion of the Court.

the speaking of the slanderous words from Brandt, who was the attorney in the suit.

It was error to instruct the jury, that if the defendant used words imputing a crime, they must find for plaintiff.

The instruction asked by defendant, that if he did not intend imputing a crime by the speaking of the words, he was not guilty, should not have been modified by the court.

The intent of the publication should have been submitted to the jury under the proof.

The evidence is not satisfactory that appellant spoke the words in any other manner than as a translation from the German into the English language, at the solicitation of Brandt. The conversation about the note, and the publication of the slander charged, were at the same time.

If the words were used by appellant merely for the purpose of translating from the German into English, and at the request, and for the information of the attorney, then they might be excusable on account of the cause of publication. There would then be no malice in law; and the malice, in fact, should be determined by the jury. The use of the words might properly come within the range of privileged communications.

In *McKee v. Ingalls*, 4 Scam. 30, the slanderous words were: "You are a thief. If you have got money you stole it."

The general issue only was pleaded; and the court sustained the following instruction as correct:

"That if the jury believe, from the testimony, that Ingalls, at the time he called McKee a thief, did not intend to impute felony to him, the words are not actionable, and they must find for the defendant."

The controlling consideration is the *quo animo*. *Cummersford v. McAvoy*, 15 Ill. 311.

In the case of *Read v. Ambridge*, 6 C. & P. 308, the words were: "He is the most blasted thief in the world, and ought to have been hung, etc.;" "he is a bloody thief;" "he robbed Mrs. Read."

DENMAN, C. J., in summing up, told the jury: "that the

Syllabus.

first question for their consideration was, whether they thought the words showed an intention to impute felony."

Words standing alone may import malice, and indicate a wicked intent. Surround them with the circumstances under which they were spoken, and the malice disappears.

The judgment is reversed, and the cause remanded.

Judgment reversed.

JOHN R. LESLIE *et al.*

v.

GUSTAV FISCHER, for use, etc.

1. *APPEARANCE—by attorney, presumption.* When an attorney enters the appearance of a party to a suit, it will be presumed that he had authority; but the presumption is not conclusive, and may be rebutted if done in apt time.

2. *SAME.*—The practice does not require a written retainer, and, as it would be a breach of professional duty in an attorney to enter an appearance without authority, until overcome by proof, it will be presumed that it was proper and authorized.

3. *SAME—vacation of judgment.* In a suit against several where it appeared that the attorney for the defendant served with process, entered the appearance of the other defendants not served, without any authority whatever, and where such defendants, at the same term, after judgment against them appeared and asked to have the judgment against them set aside, and a new trial granted, and showed a valid defense: *Held*, that it was error to refuse the motion.

4. It is a principle that lies at the foundation of the administration of justice in all courts and tribunals, that a party to be concluded must be afforded an opportunity of being heard.

5. *POWER OF COURT over record.* During the term the record of the court may be altered, changed, or amended as justice may require; and the court may vacate a judgment, and let in parties not served to defend.

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

The opinion states the case.

62	118
141	496
62	118
158	241
62	118
55a	220
68	118
72a	114

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Messrs. HARDY & HERRICK, for the appellants.

Messrs. E. & A. VAN BUREN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of debt brought by Fischer for the use of Fritz, on a bond given by Leslie and the other defendants on the appointment of Leslie as deputy sheriff of Cook County. The breach assigned was a failure to pay over moneys collected on an execution in favor of Fritz. The case was tried by the court and a jury, when a verdict was found in favor of plaintiff for debt \$10,000, and damages \$804, for which judgment was rendered, the debt to be satisfied by the payment of the damages. A motion was entered to set aside the judgment, and for a new trial, upon the ground, amongst others, that defendants Leslie, Dewey, and Farrier, had not been served with process, and that they had not authorized any person to enter their appearance. The motion was overruled, and the defendants bring the record to this court and ask a reversal.

When an attorney enters the appearance of a party to a suit, it will be presumed that he had authority. But the presumption is liable to be rebutted if done in apt time. It is not conclusive, but may be overcome by proper testimony. The practice does not require a written retainer, and as it would be a breach of professional duty in an attorney to enter an appearance without authority, until overcome by proof, we must presume that it was proper and authorized. But in this case there was a number of affidavits filed and witnesses examined to disprove authority given, and to prove that the attorney who filed the plea acted within the scope of his authority. Leslie swears he was never served with process, and had no knowledge that such a suit had been brought, until the cause was actually called for trial and the jury was impaneled ; that he never employed Hooper, or any member of his firm ; that he never authorized them to file pleas for him, and did not know such pleas had been filed, until the cause was called for trial ; that he

Opinion of the Court.

never authorized any person to employ counsel for him, and the filing of the pleas was wholly unauthorized by him. Dewey testifies to the same, and so does Farrier. They all state that they have a valid defense, and Leslie states facts in detail, which, if true, constitute a complete bar to the action.

There is no pretense that these three defendants were served with process, and it is not even claimed that Leslie ever had any notice of the pendency of the suit. If he had not, he could not have recognized Hooper as his attorney, or ratified his filing of the pleas. As to whether Dewey and Farrier ratified Hooper's employment by Lipe, the evidence is not harmonious, but they both positively deny that they ever recognized such retainer. In the light of all the evidence, we are inclined to the belief that they did not authorize or ratify the entry of their appearance. Knowing they had not been served with process, they could not have believed, as they had no right to suspect, that any attorney would enter their appearance without being specially authorized. They had not authorized Hooper to do so, nor does he pretend they did. It appears that Dewey and Farrier knew the suit was pending, and the evidence tends to show they either contributed, or promised to contribute, to pay Hooper's fee. But no one pretends that they knew that their appearance had been entered. The reasonable presumption is, that as they had not been served, if they gave any thing, or promised to do so, it was because Lipe and others, who were their co-obligors, had been served, and they felt it was but just that they should assist them in their defense.

The whole testimony being considered, we are clearly of opinion that Leslie, Dewey, and Farrier, nor either of them, authorized their appearance to be entered, or authorized Lipe or any other person to have it done. It is a principle that lies at the foundation of the administration of justice in all courts and tribunals, that a party to be concluded must be afforded the means of being heard. Other-

Opinion of the Court. Syllabus.

wise wrong and the grossest injustice and oppression must ensue. The record was still before the court, it being at the same term, and subject to be altered, changed, or amended as justice might require. During the term, the court had the power to vacate the judgment, and to let in the parties not served to defend; and we are clearly of opinion that the evidence heard on the motion not only justified but required that such an order should be made, and it was error to refuse it. The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

C. W. GOODRICH

v.

CITY OF MINONK.

62	121
129	221
62	121
30a	22
62	121
150	610
151	457
62	121
51a	585

1. **SPECIAL ASSESSMENT**—*lands not adjoining improvement.* Under the act of 1854, providing the mode of collecting assessments of cities and towns for certain purposes, the corporate authorities of towns have the power to assess real estate for benefits it may derive by ditching and tiling a street, although it may not adjoin the ditch.

2. **SAME**—*uniformity in assessments.* On application for judgment against certain land for the sum assessed for benefits from improving a ditch near the same, the owner objected that other land through which the ditch passed was not assessed, and offered to prove that such land was benefited by the ditch: *Held*, that proof that such other land was benefited by the original ditch was irrelevant, the assessments being made only for leveling and improving the same.

3. **SAME**—*notice of application for judgment.* In this case it was also objected that the collector's notice of the application for judgment was deficient, in not stating that an order of sale would be asked. There was, however, personal notice to the land owner of the application for judgment, and he appeared and filed objections. This was held sufficient to give the court jurisdiction.

4. **SAME**—*proof of notice by commissioners.* The act of 1854, relating to assessments by cities and towns, authorizes the town or city council to fix by ordinance or resolution the time and kind of notice of assessments; and when a town ordinance prescribed the form and kind of notice, and required the

Syllabus. Opinion of the Court.

commissioners to attach to the assessment roll an affidavit of the giving of such notice, it is not error to receive such affidavit in evidence to prove the posting of notices of the meetings of the commissioners.

5. *SAME—evidence—collector's return.* On application for judgment by a city for special assessments, the court received in evidence the collector's delinquent list: *Held*, no error, as the delinquent list is nothing more than the officer's return, which he makes under his official oath, and is conclusive evidence of the facts which he is required to state in it.

6. *SAME—proof as to payment.* It is also competent to prove by the city clerk that such assessments have not been paid since the return to him of the collector's warrant, but it seems not necessary, as the fact of payment should be shown affirmatively by the land owner.

7. *EVIDENCE—practice—opening case.* It is purely a matter of discretion with the court trying a case whether it will admit new or further evidence after the testimony has been closed and the argument commenced.

8. *BILL OF EXCEPTIONS—presumption as to evidence.* When the bill of exceptions does not purport to contain all the evidence, it will be presumed that there was other evidence heard sufficient to justify the action of the court below.

9. When the bill of exceptions did not purport to set forth all the evidence, the party in vacation procured the certificate of the judge who tried the case, without notice to the adverse party, that no other evidence was heard: *Held*, that such certificate was no part of the record, and could not be considered by this court.

10. *BILL OF EXCEPTIONS—amending.* The party taking a bill of exceptions on discovering that it is imperfect in not stating that it contains all the evidence, should, on proper notice, apply in open court to have it amended, and then the amended record can be filed in this court.

APPEAL from the Circuit Court of Woodford County; the Hon. S. L. RICHMOND, Judge, presiding.

Messrs. CHITTY & GARATT, for the appellant.

Mr. M. L. NEWELL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the Circuit Court of Woodford County to reverse a judgment rendered against appellant's lot of ground in the city of Minonk, assessed for the improvement of a certain ditch theretofore constructed by the city

Opinion of the Court.

authorities. Appellant had due notice of the assessment and of all the preliminaries required by the statute to authorize a judgment. By the act of 1854, Session Laws, section 2, it is provided, in all cases where assessments have been or may hereafter be made by the corporate authorities of any town or city in this State, on any lot or real estate in such town or city, for the purpose of improving any street, sidewalk, or alley in front of such lot or real estate, or for any purpose whatever, either by ordinance, resolution, or other proceeding, and such assessment is not paid within the time fixed by the order, resolution, or ordinance making the assessment, the corporate authorities may apply to the county court for judgment against the lot for the amount of the assessment and costs.

An order was duly entered of record by the city council on the 3d of September, 1869, directing that "the main ditch running on the east side of Chesnut street, from the calaboose, north to Stoddard and Newton's crossing, be completely leveled with sumps, and tiled with twelve-inch tile, and that upon completion thereof an assessment be made upon the lots, premises, and real estate in said city benefited thereby, for the special benefits to said lots, premises, or real estate, arising from said ditch.

The sum of twenty dollars was assessed on appellant's lot, and he complains that his lot did not adjoin this ditch, and seems to confound this improvement as ordered by the city council with the improvement of a street, sidewalk, or alley, which the lot to be assessed, must adjoin or front upon.

This is a mistaken view. The power to make this assessment is fully conferred by that portion of the act of 1854, which we have quoted.

Appellant next complains that the real estate of the Illinois Central Railroad Company, which this ditch passes through, was not assessed.

The assessment was not for making the ditch, but for improving it, and the record does not show the real estate of this company was specially benefited by this improvement.

Appellant, however, insists that he offered to prove by a

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competent witness, that this railroad company was greatly benefited by the construction of this ditch, and the court rejected the testimony.

When it is recollected that the assessment was for tiling this ditch and leveling it with sumps, any testimony as to benefits arising from its original construction was irrelevant, and was properly rejected.

It is further complained that the collector's notice of application for judgment in the county court was insufficient, and the court could not legally enter an order for the sale of the lot, the notice not having stated that an order of sale would be asked for. Reference is made to *Charles v. Waugh*, 35 Ill. 315. In that case there was no personal notice upon the owner, nor appearance by him. In this case there was personal notice, an appearance entered, and objections filed. Appellant was in court, subject to any judgment the court might pronounce. The act of 1854 leaves it discretionary with the corporate authorities as to the time and kind of notice of the application to the county court, and therein differs from the general revenue law, which gives the form of the notice, and under which the case of *Charles v. Waugh*, *supra*, was decided.

It is further objected by appellant that after the testimony was closed, and the argument had commenced, the court, against the objection of appellant, allowed the plaintiff to introduce the charter of the city of Minonk.

This was merely matter of discretion with the court, with which we would not interfere. *Young v. Bennett*, 4 Scam. 43.

It is also insisted that the court erred in receiving in evidence the notice and affidavit of Morris, as to the posting of notices for the meeting of the commissioners to make the assessment.

Under the act of 1854 full power is given the city council to fix, by ordinance or resolution, the time and kind of notice of assessment. The seventh section of the ordinance passed by the city council on this subject prescribes the form and kind of notice, and provides "that the commissioners

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shall attach to the assessment roll an affidavit of the giving of said notice as aforesaid."

When this affidavit is attached to the assessment roll, it necessarily becomes a part of it, and when the roll was in evidence the affidavit of posting the notice was at the same time in evidence, and being attached to the roll by the commissioners it became, under the authority of the *City of Ottawa v. Macy et al.* 20 Ill. 421, to all necessary intents, a certificate.

But independent of all this there might have been testimony before the court of the kind required by appellant. Some witness may have been sworn to the fact of posting the notice. The bill of exceptions does not purport to contain all the evidence, and we have a right to presume the court had evidence before it of a witness who performed the act of posting.

It is insisted by appellant, that the record does contain all the evidence and this is manifested by the certificate of the judge who tried the cause, given after he signed the bill of exceptions, and without notice to the opposite party, and in vacation.

This certificate is no part of the record, and can not be used to enlarge the bill of exceptions or change it in any way; and it can not be considered by this court.

The party taking the bill of exceptions, on discovering its imperfection, should, on proper notice, apply in open court to have it amended. The amended record could then be filed in this court. *Wallahan v. The People*, 40 Ill. 103

The other objections as to receiving in evidence the assessment roll and the delinquent list are answered by what has been said as to the notice. The delinquent list is nothing more than the collector's return, which he makes under his official oath, and is conclusive of the facts which he is required to state in it.

A special assessment not being a tax, the article of the ordinance cited by appellant has no application.

It has been uniformly held by this court, that the col-

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lector's warrant, and return thereon, are conclusive of the facts stated in them. *City of Ottawa v. Macy, supra; Taylor v. The People*, 2 Gilm. 351.

We see nothing in any other objection urged demanding special notice. It was competent to prove by the city clerk that since the return of the warrant to his office, and before judgment, appellant had not paid the assessment against his lot; but the fact of payment should be made out by appellant himself.

We fail to perceive on what ground it can be insisted that the judgment against appellant was not in accordance with the law and the evidence. The assessment in question was not made on the basis of prospective benefits, but was made to pay for work already done in obedience to an ordinance of the city council, which they had ample authority to pass.

From a careful consideration of the points made, and of the evidence, we can discover no error in the proceedings, and accordingly affirm the judgment.

Judgment affirmed.

62 126
29a 476

GEORGE W. FITCH

v.

SOLOMON ZIMMER.

1. *NEW TRIAL—finding as to facts.* When the questions for determination are ones of fact only, and the evidence, though conflicting, is sufficient to sustain the verdict, this court will not disturb the finding.

Appeal from the Circuit Court of Whiteside County; the Hon. WILLIAM W. HEATON, Judge, presiding.

Messrs. HENRY & JOHNSON, for the appellant.

Messrs. WILKINSON, SACKETT & BEAN, for the appellee.

Per CURIAM: This was an action of covenant, by the lessor

Syllabus.

against the lessee. Numerous breaches were assigned, and testimony heard upon each of them.

The evidence, though somewhat conflicting, is sufficient to sustain the verdict of the jury.

There is not a single question presented, which the jury were not fully competent to determine.

After a careful review of the evidence, we are unwilling to disturb the finding.

The judgment is affirmed.

Judgment affirmed.

WILLIAM ZSCHOCKE

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

LARCENY—*constable converting proceeds of sale.* A constable, having an execution placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor and put them in possession of the judgment creditor. A short time afterward the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of \$55, which he converted to his own use. In a prosecution against the constable, under an indictment charging him with having stolen divers United States notes and current bank bills for the payment of \$55, and of that value, of divers issues and denominations, to the grand jury unknown, the personal goods and property of Matthias Eck, who was the judgment creditor, it was *held* the prosecution could not be maintained—not under Section 71 of the Criminal Code, declaring the felonious conversion of money, goods, etc., by a bailee to be larceny, because in no sense could the constable be regarded as the bailee of the judgment creditor; the general property in the goods after the levy, until a sale according to law, being in the judgment debtor, and the money derived from a sale is not the property of the plaintiff in the execution until paid over to him, but until that time is in the custody of the law. Besides, the goods were not sold according to law, but at private sale—the officer, by such abuse of his authority, becoming a trespasser *ab initio*, and the judgment creditor could not, by ratifying such trespass, obtain a legal right to the fruits of the wrongful act of the officer.

WRIT OF ERROR to the Criminal Court of Cook County;
the Hon. JOHN G. ROGERS, Judge, presiding.

Opinion of the Court.

Mr. OMAR BUSHNELL, for the plaintiff in error.

Mr. CHARLES H. REED, State's attorney, for the people.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

The plaintiff in error was convicted in the criminal court of Cook County, and sentenced to two years' imprisonment in the penitentiary, upon an indictment charging him with having stolen divers United States notes and current bank bills for the payment of \$55, and of that value, of divers issues and denominations, to the grand jury unknown, the personal goods and property of Matthias Eck.

There is no evidence in the record tending to show that any money was ever taken from the possession of Eck, and the only question is, whether there is evidence sufficient to support a conviction under Section 71 of the Criminal Code (R. S. 162), declaring the felonious conversion of money, goods, etc., by a bailee to be larceny.

It appears that the accused holding himself out to be a constable, and Eck having an execution in his favor, issued upon a justice's judgment, against one Jacob Forsythe, delivered the writ to the prisoner, to be executed; that under the execution the prisoner levied upon certain goods of the judgment debtor and took them to Eck's house, and put them into his possession; that afterward the prisoner came and took the goods away, with Eck's consent, and sold them at private sale, receiving therefor the \$55 alleged to have been stolen, which the prisoner converted to his own use.

If the prisoner was a constable, as was assumed on the trial, the levy and seizure of the goods under the execution would vest in him a special property in them; the general property would remain in the judgment debtor until a sale according to law. The plaintiff in the execution acquires no property in the goods by the seizure. He could not maintain an action of trespass or trover against a wrong-doer; such action could be brought only by the officer.

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When a sale is made, under the writ, pursuant to law, then the general property of the judgment debtor becomes divested, and the proceeds of the sale remain in the custody of the law until actually paid over to the plaintiff. The specific money in the hands of the sheriff is not the property of the plaintiff in the execution until paid over to him. *Lightner v. Steinagel*, 33 Ill. 510.

But in this case the goods were sold, not by authority of law, but at private sale. By such abuse of an authority given by law the officer became a trespasser *ab initio*. We are at a loss to know how one man can, by ratifying a trespass committed by another, obtain a legal right to the fruits of such wrongful act. If Eck, knowing of the wrongful act of the prisoner, had received the money obtained, he would have become a joint trespasser with the prisoner. It can not be the law that a constable or sheriff who becomes a tort-feasor, in the manner disclosed here, holds the fruits of the tort as bailee for the plaintiff in the writ, because the plaintiff, by ratifying the act, becomes himself a party to it; and then the result would always follow that one of two joint tort-feasors would become the bailee of the other as to the proceeds of the tort, by virtue of the wrongful act itself, simply because he happened to be the first possessor. The law does not recognize even the right to contribution between wrong-doers, and much less will it the relation of bailor and bailee, from the mere fact that one is in possession of the fruits of the wrong.

There is no view of the evidence which will support the position that the prisoner was the bailee of Eck, as to the money received upon the private sale of the goods.

The conduct of the prisoner merits severe punishment, but we can not sustain this conviction without disregarding all distinctions between crimes.

The court below should have granted the motion for a new trial, and it was error to refuse it; for this reason the judgment of the court is reversed and the cause remanded.

Judgment reversed.

WILBUR H. ROBINSON *et al.*

v.

JAMES PARISH.

1. EVIDENCE—*burden of proof*. When the plaintiff declares generally for work and labor done, and materials furnished, and the defendant files the general issue with notice that he will insist on the trial that the work was performed under a written contract, the burden of proof is not thrown upon the plaintiff to show an abandonment of the special contract, until the defendant has proved the averment in his notice.

2. NEW TRIAL—*finding of jury*. When the testimony in respect to a material fact, is contradictory, and can not be reconciled, as the jury have the advantage of judging from the manner, appearance, and interest of the witnesses, this court will not disturb their finding.

APPEAL from the Superior Court of Cook County; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs J. C. & J. J. KNICKERBOCKER, for the appellants.

Mr. JOHN W. BENNETT, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The errors assigned are:

First. That the court erred in giving the second instruction for appellee.

Second. That there was a non-joinder of a proper plaintiff.

Third. That the verdict was against the evidence.

The second instruction was: "that the burden of proving that the work and materials were furnished under the written contract, is upon the defendants in this case; and they are required to establish that fact by a preponderance of evidence. If a written contract for the doing of the work be proved, then the burden of proof is on the plaintiff to show that such contract was abandoned before recovery for such work otherwise than under the written contract."

Opinion of the Court.

The action was assumpsit for work and labor done, and materials furnished. The plea of the general issue was filed, and a notice that it would be insisted on the trial, that the work was performed under written contract, set out in the notice.

The pleadings, as assumed by counsel, did not throw upon appellee the burden of proof of abandonment of the contract, until appellants proved the averments in their notice. No principle of law required this. If there had been a formal plea of set-off, appellants would have been bound to prove it. They would then have assumed the attitude of plaintiffs. The plea of non-assumpsit, with notice of special matter, having been filed, an issue was joined; and the parties must then prove the affirmative averments made by them respectively. The plaintiff must prove his cause of action under the common counts; and the defendants must prove the performance of the work under the written contract. Then only would it devolve on the plaintiff to show an abandonment of such contract. *Kelly v. Garrett*, 1 Gilm. 649; 1 Saund. on Plead 1088; *Burgwin v. Babcock*, 11 Ill. 28.

The rule contended for by counsel for appellants, would require the plaintiff not only to prove his own case, but then to establish that of his adversary.

The cases cited bear no analogy to the one at bar. In *Martin v. Brewster*, 49 Ill. 306, the defendant filed a plea in abatement, that the cause of action did not accrue in Cook County. The defendant replied, that it did accrue in Cook County, but offered no proof to sustain the replication. He assumed the burden of proof, and made none.

In the case of *Bentley v. Bentley, Executor*, 7 Cowen, 701, the declaration was on a note, given by the testator to the plaintiff. The defendant pleaded *plene administravit*. The plaintiff replied, that defendant had goods and chattels, etc. The court decided that the burden of proof was on the plaintiff.

The substantial part of the plea was, that the defendant had no goods and chattels. In a note to *Noel v. Nelson*, 2

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Saund. 221, Sergeant Williams says, the words that they have fully administered the goods, etc., seem to be superfluous. The more formal and correct way of pleading appears to be, that they have no goods or chattels, omitting the words, that they had fully administered.

The replication was, therefore, affirmative, and proof of its averments devolved upon the plaintiff.

In the case at bar, the plaintiff below filed no replication to the notice of set-off. He could not have done so, for the reason that it was no plea. By the pleadings, therefore, he assumed no affirmative, so far as the written contract was concerned.

The instruction was substantially correct, and could not mislead.

The other errors assigned depend wholly upon the evidence.

Appellee testified that no person was interested with him in the work performed, and that it was not done in pursuance of the written contract; and that the writing was wholly abandoned and surrendered before the commencement of the work.

His statement is, to some extent, corroborated, but is positively contradicted by the opposite party. To whom shall the most credit be given? How can we harmonize the diverse statements?

The manner, appearance, and interest of the witnesses were observed and closely watched by the jury, and necessarily and properly influenced their conclusion. These are not imaged to us in the record.

There is no reason for reversal, and the judgment is affirmed.

Judgment affirmed.

NATHANIEL S. PIERCE

v.

JULIA ANN MILLAY, by her next friend, etc.

1. PARENT AND CHILD. In an action of trespass to recover for personal injuries to a child, the alleged trespass being the placing of the child, by the defendant, in a buggy and driving off with her, when the horse took fright and ran away, throwing out the child and causing the injury complained of, the defendant set up the permission of the mother to take the child: *Held*, the plea, which merely alleged the permission of the mother, without averring any authority or circumstance implying an authority on the part of the mother to give such permission, was defective, as the mother, as such, is entitled to no disposing power over the person of the child, the father being the person entitled by law to the custody of his child.

2. INSTRUCTION. Where the court, in modifying an instruction asked by the defendant, merely employed the language of the defendant used in another of his instructions, it was *held*, although the instruction as thus given was erroneous, the defendant could not be allowed to complain.

APPEAL from the Circuit Court of La Salle County; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BLANCHARD & SILVER, for the appellant.

Messrs. STIPP, BOWEN & SHEPHERD, and Mr. H. K. BOYLE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This case has been in this court once before—*Pierce v. Millay*, 44 Ill. 189.

The right of recovery was then recognized, and the judgment was reversed, on the ground alone that the damages were excessive.

Another trial has been had, resulting in a judgment for the plaintiff for \$1,000 dollars damages—the former verdict having been for \$4,000.

The evidence upon the last trial does not appear to have been essentially different from what it was on the former one, and we can not say that it does not justify a verdict

62	133
146	621
62	133
167	160
62	133
190	72
62	133
109a	1392

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for the plaintiff; and the damages now recovered are reduced so largely in amount from the former recovery that we do not feel warranted in disturbing the present finding as to the amount of damages.

It is objected that a demurrer was sustained to the defendant's third additional plea, which was filed in the cause after it was remanded to the court below. This plea sets up the permission of the mother to take the child.

It is defective in merely alleging such permission of the mother, without more; not averring any authority, or circumstances implying an authority, to give such permission. The father is the person entitled by law to the custody of his child.

A mother, as such, is entitled to no disposing power over the person of the child. 1 Black. Com. 453.

We perceive no error in giving instructions for the plaintiff.

It is urged that the court erred in so modifying instructions asked by the defendant, as to declare the law to be, that an action will lie against the husband alone, for the sole trespass of the wife during coverture. Although the defendant should not have been sued alone for a trespass by his wife, unless committed under his direction, express or implied, yet the court only adopted in its modifications in this respect, the language employed by the defendant himself in his second instruction, and he should not be admitted to complain of it as erroneous.

Other qualifications, as well as refusal of instructions for the defendant, are assigned as error, which we have carefully considered, and regard the ruling of the court to have been substantially correct. The instructions given on the part of the defendant declared the law of the case as applicable to the defense very fully and fairly, leaving to the defendant no just ground of complaint on that score.

The judgment of the court below must be affirmed.

Judgment affirmed.

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JOHN SOUERBRY

v.

OTTO FISHER.

62	136
37a	306
62	185
d94a	428

1. JUDGMENT—*setting default aside—discretion.* Appellant was sued jointly with another in trespass for an assault and battery. His co-defendant employed counsel who filed a plea of the general issue for both, there being no service. The counsel, about three years afterward, procured the entry of a *nolle* as to the co-defendant, and abandoned the defense of appellant, on the ground that he had paid no fee, and his default was taken, and damages assessed at \$500, upon which judgment was rendered. He at the same term moved to set aside the judgment and for leave to defend, showing that he was not guilty, and that the other defendant who had committed the trespass had agreed to defend. The court overruled the motion: *Held*, that the court erred in refusing the motion.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. SHUFELDT & BALL, for the appellant.

Mr. FRANCIS A. HOFFMAN, for the appellee.

Per CURIAM: If courts are created for the purpose of administering justice, the default and judgment, in this case, should have been set aside.

At the June term, 1868, of the Superior Court of Chicago, a declaration in trespass for assault and battery was filed in said court, against appellant and one Beebee.

King appeared as attorney for defendants, and filed the general issue at the July term, 1868. No summons appears in the record.

The case lingered in court until the June term, 1871, when a *nolle prosequi* was entered as to Beebee, and also the default of appellant; a jury called and sworn to assess the damages, and a verdict returned for \$500, upon which judgment was rendered.

At the same term a motion was made to set aside the judgment, and allow a defense.

Opinion of the Court.

The affidavits filed, *pro* and *con*, show that the *nolle* was entered at the suggestion of King, so that he might abandon the case as to the appellant, because he had not paid him his portion of the fee; that he had been employed to defend for both; was to receive \$25 from each of the defendants; that Beebee had paid him \$25, and appellant, though often promising, had refused to pay; that a few days prior to the default he notified appellant that he must pay, or obtain other counsel; and that appellant declined, claiming that the defense of the suit was the business of his co-defendant; but King does not state that he informed appellant of the particular day for trial, or that he would have the cause dismissed as to Beebee.

Other affidavits, with one exception (which we shall notice), show that Beebee was the really guilty party, and that appellant had no connection with the alleged trespass; that he neither aided by act nor countenance, and was in fact absent at the time of the difficulty between Beebee and the plaintiff; and that appellant, knowing that he was only a nominal party, relied upon his co-defendant to make the defense.

Hoffman, the attorney for the plaintiff, stated, in his affidavit, that appellant "had fairly admitted to him the commission of all the trespasses laid to his charge in the declaration." This is a very unusual admission, and, in view of the statements in the other affidavits, is a very strange one.

The affidavit is too general, and is of that character which is not entitled to weight in comparison with other proofs in the case.

King, as he says, "had kept an eye on the case" for three years. He had filed the general issue and "kept an eye on the case," during all this time, for \$25. Through his agency alone was appellant in court, for no summons had been served upon him, and if he would not defend without the payment of his fee, he ought not to have pleaded. A retainer should have been deemed as necessary in the one case as in the other.

He should, then, instead of the abandonment of appellant to a most unrighteous default, have placed him where he found

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him. It seems that appellant was regarded as amply responsible, for the plaintiff was willing to risk him for the payment of the judgment.

The manner and circumstances under which the judgment was obtained do not recommend it to our sense of right or justice. The bargain in court to screen the guilty and punish the innocent is opposed to every principle of law.

A man has been mulcted in \$500 for acts which he never committed. The injustice is so apparent that we feel that it is our duty to control the discretion of the court below.

From the facts before us this judgment unvacated would be a standing record of wrong and oppression to an innocent man. *Mason v. McNamara*, 57 Ill. 274.

It is ordered that the judgment be vacated, the default set aside, and appellant be allowed to make his defense to the suit.

The judgment is reversed and the cause remanded.

Judgment reversed.

MICHAEL CAHILL

v.

JAMES WILSON.

1. **HOMESTEAD**—*lost by abandonment*. In 1859 a husband and wife executed a deed of trust upon premises which had been occupied by them as a homestead, the title to which was in the wife, there being no release of the homestead right. Two years prior thereto they removed from the premises and were continuously absent until 1862, a period of five years, one year of which they resided out of the county. The husband when he left had contracted to open a farm upon which he was to reside three years. During the absence the home premises were rented to different persons. They were sold under the trust deed in March, 1861: *Held*, that the homestead right was lost by abandonment, and that the lien attached while such abandonment was complete, and could not be defeated by returning and residing on the premises.

2. When a party left his homestead some two years before he incurred the same, and changed his residence, accompanied by his family, with a view of opening a farm and bettering his condition, it seems that the

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creditor could not be charged with information that the premises were claimed as a homestead, except by the actual residence of the party. The occupancy of a tenant will afford no notice of the right.

APPEAL from the Circuit Court of Stephenson County; the Hon. BENJ. R. SHELDON, Judge, presiding.

Mr. J. A. CRAIN, for the appellant.

Mr. U. D. MEACHAM, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The only question for determination is: Was there a homestead right, which would defeat a recovery in ejectment?

In February, 1859, appellee and wife executed a trust deed on the premises in controversy. At a sale thereunder appellant purchased the property, and obtained a deed in March, 1861. The fee was in the wife of appellee at the date of the trust deed, which was formal in every respect, except there was no release of the homestead.

Was there an abandonment?

The evidence clearly shows that appellee and his wife, in 1857—two years prior to the execution of the trust deed—removed from the premises, and were continuously absent therefrom until in March, 1862; he had contracted to open a farm, upon which he was to remain for three years; for one year or more of the five years of absence the family resided in another county; during this time different persons had rented the property from appellee or his agent.

The only evidence bearing upon the intention to return and occupy the premises was, that appellee inquired of an attorney as to the mode of preserving his homestead rights.

The homestead, which might have been held under the law, was abandoned; a residence had been acquired elsewhere; and the abandonment was complete at the time of the execution of the trust deed; the continued absence without any manifestation of an intention to return confirmed the abandonment;

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the party for whose benefit the trust deed was given had no information of the claim of a homestead right; under the circumstances of this case this could only exist by the actual residence of the party, and not by the occupancy of the tenant; the latter was no notice of the existence of the right, and its confirmation, in view of the conduct of the husband, would be the assurance of a fraud upon the purchaser. We can not encourage transactions tainted with bad faith.

The husband had the right to and did control the residence of the wife and children. He intentionally changed his residence, accompanied by his family, with the purpose of opening a farm and bettering his condition. The lien attached while the abandonment was perfect; and the return and residence on the premises, after the lapse of so many years, could not regain the lost right.

The principles involved in this case, and applicable to the facts, have been so fully decided and elaborately discussed in former opinions of this court, that it is only necessary to refer to them. *Cabeen v. Mulligan*, 37 Ill. 230; *Phillips v. City of Springfield*, 39 Ill. 83; *Titman v. Moore*, 43 Ill. 169; *Fergus v. Woodworth*, 44 Ill. 374; *Buck v. Conlogue*, 49 Ill. 392.

We are of opinion that, in this case, there was an abandonment of the homestead; and there was no satisfactory proof of the intention to return.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN HAMILTON

v.

THOMAS ROOK.

1. SPECIFIC PERFORMANCE—*laches, excuse for.* A purchased three eighty-acre tracts of land and a lot of two acres; and afterward being unable to

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pay, reconveyed to B, his grantor, two of the eighty tracts, and it was contended that he intended also to include in this conveyance the two-acre tract. He never paid the taxes afterward on it; but about six years afterward, by a verbal contract, sold it to C for \$40, to be paid in rails. C took possession and built a house on it, and improved the same, and offered to make payment, and demanded a deed. A then informed him that the title was in B, and told him he must go to the latter for a deed, which he did, and took a bond for a deed. He then sold his interest to D, who sold to E. After this, A filed a bill against E to enjoin the removal of the building, and E filed a cross bill to reform the deed from A to B, by inserting therein the premises in dispute, and subsequently amended his bill, praying for specific performance of the verbal contract of sale to C, which was decreed by the circuit court upon payment of the purchase money due: *Held*, that the decree was proper, and that the conduct of A, in sending C to B for a deed, relieved C of all charge of laches, in abandoning his contract with A, and that E, under the circumstances, was not chargeable with laches.

APPEAL from the Circuit Court of Bureau County; the Hon. E. S. LELAND, Judge, presiding.

The facts are sufficiently stated in the opinion of the court.

Mr. S. M. KNOX, for the appellant.

Mr. J. I. TAYLOR and Mr. THOMAS J. HENDERSON, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

In December, 1857, one Bubach sold to the complainant, Hamilton, a tract of land consisting of three lots of eighty acres each and a lot of two acres. In 1860, Hamilton reconveyed to Bubach two of the lots, containing one hundred and sixty acres. Bubach swears that it was understood, at the time, that the deed also included the lot of two acres. Hamilton denies this in his testimony. In 1866, one Britt went to Hamilton to buy this two-acre lot, and, according to the testimony of both Hamilton and Britt, made a verbal con-

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tract of purchase—Hamilton telling him he could go on and build his house, and Britt agreeing to pay in the following March. The price agreed on was \$40, which Britt testifies Hamilton was to take in rails. Some time in the winter, after making this contract, Britt swears he called on Hamilton again, having, in the meantime, built his house, and told him the rails were ready, and asked for a deed. Hamilton, as Britt testifies, then told him the title was in Bubach, and that he must go to him for a deed. Britt went to Bubach, who gave him a bond for a deed on payment of \$45. Britt subsequently sold his interest to Garver, and Garver sold to Rook, the appellee herein. Hamilton, in 1870, filed a bill against Rook, alleging that he was about to remove the house from said two acres, and praying for an injunction. The appellee answered, and filed a cross bill setting up Britt's bond from Bubach and the assignments to himself, and alleging a mistake in the reconveyance from Hamilton to Bubach. He afterward filed an amended cross bill setting up the verbal contract between Hamilton and Britt, alleging the facts above stated as part performance, and praying for relief under this contract if denied on the other ground. The court held the mistake in the reconveyance not sufficiently proven, but granted the relief asked under the amended cross bill, requiring Hamilton to convey on the payment of the \$40 and interest.

Although the evidence in this case is not of the clearest character, we think the court did not err in its decree. That a verbal contract was made, is shown by the evidence of the appellant himself; and that Britt took possession and built his house under that contract, is equally clear. He testifies, when he went for his deed, the appellant referred him to Bubach; and while this is denied by appellant, it is difficult to explain why Britt should have gone to Bubach and have agreed to give him five dollars more than he was to give appellant, unless the latter had in some way referred him to Bubach as the person from whom the title was to come. Britt gained nothing by taking the bond from Bubach, and was placing his improvements in peril. His statement is consistent with the

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established facts in the case, and he is a disinterested witness. He further states that when he told appellant the rails were ready and demanded a deed, appellant not only referred him to Bubach, but said he himself could not give him a deed. If this be true, it relieves Britt of all charge of laches or of abandoning his contract with appellant.

No presumption is to be indulged against the appellee because in his first cross bill he only set up the bond from Bubach. He was not the immediate purchaser from Britt, and may well have been ignorant of the true character of the transaction.

The decree does substantial justice. It gives appellant the price for his land, which he admits he sold it for, with interest, instead of giving him, for nothing, the improvements purchased by appellee in good faith.

Decree affirmed

CHICAGO CITY RAILWAY COMPANY *et al.*

v.

JAMES R. HENRY.

1. DAMAGES, EXCESSIVE—*personal injury*. In an action on the case against a city railway company to recover damages for personal injury resulting from being ejected and thrown from a street car by the servants of the company, it appeared that the plaintiff got up immediately after he was thrown upon the ground, pursued and overtook the car, and walked a considerable distance the same evening; went to work the next day, as usual, and, when examined some days afterward, there was found no abrasion, contusion, or external injury; and the whole evidence failed to show that he had received any serious and permanent injury; and it further appeared that at the time of the trial he had recovered to a considerable extent; and, even if the injury received was permanent, that it was not so serious as to disqualify him from business or earning a livelihood. The jury returned a verdict for \$12,000 damages: *Held*, that the damages were so grossly and glaringly excessive that a new trial should have been granted.

2. EVIDENCE—*pecuniary ability in aggravation of damages*. On the trial of an action against a street railway company and the conductor to recover for

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personal injuries for the acts of the servants of the company, the court received evidence of the pecuniary ability of the company in aggravation of damages: *Held*, that the admission of the evidence was improper, as the conductor was liable for the judgment, and the evidence as to him was highly prejudicial.

APPEAL from the Circuit Court of Du Page County; the Hon. SILVANUS WILCOX, Judge, presiding.

This was an action on the case brought by appellee in the Superior Court of Cook County against the Chicago City Railway Company, and Michael Moran, the conductor. The testimony was voluminous, but the conclusions of fact therefrom are stated in the opinion.

Messrs. HITCHCOCK, DUPEE & EVARTS, for the appellants.

Messrs. COOPER & PACKARD, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellee in the Superior Court of Chicago, against appellants to recover damages for injuries claimed to have been received by being ejected from the cars of the company. The venue was subsequently changed to the circuit court of Du Page County, where a trial was had before the court and a jury, resulting in a verdict and judgment for \$12,000 against appellants.

It is first urged that the verdict is clearly against the evidence. The evidence is conflicting, and as it is the province of the jury in such cases to weigh it, unbiased, and free from extraneous considerations, we shall forbear to comment on its weight, as the case must be submitted to another jury when the same evidence will no doubt be again introduced.

When the evidence is attentively considered, we are irresistibly forced to the conclusion that the verdict is glaringly excessive. The injury bears but a slight comparison to the damages awarded. It is proved, and seems not to be contradicted, that appellee arose immediately after striking the ground, pursued the car, overtook, and caught hold of it, and

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called upon persons present to witness and remember the circumstances. He seems to have walked a considerable distance the same evening after the occurrence, and went to work the next day as usual, but swears he felt sore and a little dizzy. On being examined by his physician, some six or eight days after, no abrasion, contusion, or other external injury to the head was discovered, nor apparent injury to any portion of his body. In all of this we have nothing that indicates severe injuries. But some ten days later, when another physician was called in consultation, the appearance of a depression was discovered on one side of his head. But whether natural, accidental, and of long or recent standing does not appear. Nor do we see that it was caused by the fall from the car.

That appellee was injured there seems to be no doubt, but whether the injury is serious and permanent, from the evidence, there is great doubt. His medical witnesses do not express any very decided opinion on that point. They incline to the opinion that, when a severe injury has been received by the nervous system, the person seldom ever recovers completely. But whether appellee has received such an injury appears to be more than doubtful. After being out of employment for about four months, the firm with whom he was engaged procured his return to his former employment at the same wages, which they have regularly paid him ever since; and one of the members of the firm says they employed him because he was better qualified for the place than any one else he could employ. It is true, the testimony shows they have furnished him with a stronger man to assist in heavy work since than before the injury. But we can hardly believe that he is injured mentally, when his employers find him still, from his experience, more skillful than others whom they could employ to fill the place.

As to the extent and permanency of the injury the physicians disagree. Appellee's seem to regard it serious, and think it probable that it will be permanent in its character, while Dr. Rea, called by appellants, thinks he will recover; and the

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time of his recovery depends to some extent on the termination of this suit. From the medical testimony, and the apparent slight nature of the injury when it occurred, it would be difficult for any one, we think, to say that it is permanent. It is true, no one can determine with absolute certainty what the result of such an injury might be; but something more than mere conjecture, mere probabilities, should appear to warrant the giving of damages for future disabilities that may never be realized. Even appellee's physicians say he will probably continue to improve, but think he will never be fully recovered. He, it seems, recovered to a great extent in the first four months, so much as to be able to resume his usual occupation, at his former compensation.

Even if a permanent injury has been sustained, it does not seem to be of that serious nature which disqualifies appellee for business, and that disqualifies him from earning a livelihood. And in view of that, and other facts, we can not but regard this verdict as grossly excessive. Had this been a suit between individuals, we presume such a verdict would strike every one as being excessive. We remember no case, or to have seen any reported, where a natural person was alone a defendant, where, for like injuries, so large a verdict was rendered. And the law does not know, and can not know, any difference in litigation, whether natural or artificial persons are parties. In the courts of justice, this class of corporations are entitled to the same measure of justice, and must be held to the same liability for wrong as individuals. If the acts of their agents are wanton, willful, or reckless of the personal rights of individuals while such employees are in the discharge of their duties, the company may be required to respond in damages to the same extent as individuals; but to no greater extent than would individuals for similar acts. The company are required to employ competent, faithful, and proper agents. If they fail in this requirement they must suffer for the neglect.

In this case, evidence was received of the pecuniary ability of the company for the purpose of enhancing the damages in case of a recovery. This was wrong; Moran was a defendant,

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and would be liable, individually, for any judgment that might be recovered. Then to have the judgment largely enhanced because his co-defendant was worth a million of money, would operate as great injustice if not oppression to him. This evidence, no doubt, contributed largely to this verdict, as we can not for a moment believe that had the suit been against Moran alone, it would have been more hundreds than it is thousands, if even so much. The introduction of that evidence must have operated greatly to the prejudice of Moran.

For the excessive finding of the jury, the judgment of the court below must be reversed. But, whether appellant Moran was justified in ejecting appellee from the car, or if not, whether there is ground for allowing punitive damages, we express no opinion, as those questions are for the consideration of another jury. The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

WILLIAM C. HOBSON *et al*

v.

EVAN EWAN.

1. ADMINISTRATOR'S SALE OF LAND—*grant of letters*. In an action of ejectment, a sale of land by an administrator was claimed to be void on the ground that the intestate died in the State of Kentucky, and that the administrator appointed was neither a relative nor creditor, and not interested in the estate, and consequently letters could only be granted to the public administrator: *Held*, that this objection could not be raised in a collateral proceeding.

2. SAME—*presumption*. The county court being invested with complete jurisdiction of the subject of granting administration on the estates of deceased persons, its action in a case properly brought before it, however erroneous it may be, must be regarded as valid and binding in every collateral proceeding until reversed. And where that court granted administration on the estate of one who died intestate, and was a non-resident, it will be presumed, in all collateral proceedings, that it had satisfactory evidence before it to justify its action.

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3. ADMINISTRATOR'S SALE—*jurisdiction—notice of application.* The following notice was given of the presentation of a petition of an administrator for an order to sell land to pay the debts of his intestate, to-wit: "To all persons interested: Take notice, that I intend to present a petition to the circuit court at its next term, to be holden in Monmouth, in the County of Warren, and State of Illinois, on the third Monday of October, A. D. 1853, praying said court for an order to sell all of the real estate belonging to the estate of Bushnell Willey, deceased, for the purpose of paying the debts against said estate." It was signed by the administrator, and dated Monmouth, Ill., August 2, 1853, and published for the time required by the statute: *Held*, that the notice was sufficient to give the court jurisdiction.

4. Under the statute in force in 1853, the administrator had the choice of two modes by which to bring the heirs into court, the one by serving a notice, with a copy of the account and petition, on each of the heirs or their guardian, and the other by publishing a notice, to all parties interested, in the nearest newspaper. Either mode was sufficient to bring the heirs and all interested parties into court, and thus give the court jurisdiction of their persons, and in neither was it necessary to state the names of the heirs, or other interested parties, in the notice.

5. ADMINISTRATOR'S SALE—*notice of application.* An administrator's sale of real estate, under an order of court, was attacked on the trial of an action of ejectment on the ground that the notice of the application was, that he would apply for an order to sell *all* the lands of the intestate, instead of "the whole, or so much thereof as will be sufficient to pay his debts:" *Held*, that as the statute prescribed no particular form of notice, and as the notice itself fully apprised all parties interested of the nature of the application, and the time and place when and where it would be made, the objection was not tenable.

6. So, also, when such notice was directed "to all persons interested," an objection that the notice did not request all persons interested in the estate to show cause why the land should not be sold to pay debts, was considered without force. The same strictness required in applications to sell lands for delinquent taxes does not apply in proceedings of this kind.

7. SAME—*finding as to notice.* When the circuit court on the petition of an administrator for an order to sell the lands of his intestate to pay the debts of the estate, finds in its decree that due notice of the application had been given by publication, it is at least *prima facie* evidence that the notice required by law had been given.

8. ADMINISTRATOR'S SALE—*petition.* Although the statute required the administrator to state in his petition for an order to sell real estate to pay debts "what real estate the testator or intestate died seized of, or so much thereof as will be necessary to pay his or her debts," yet when a petition, after stating that there remained no personal assets, and the existence of a large indebtedness, concluded in these words: "that to pay the debts there

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only remained the real estate belonging to the estate," describing it: *Held*, that the statement was equivalent to a technical allegation of seizin, and was sufficient.

9. *PETITION—names of heirs.* It is no objection that the names of the heirs are not stated in such a petition. Such omission will not invalidate the decree of sale.

10. *SAME—address.* It was objected in a collateral proceeding involving the question of title, that an administrator's petition for leave to sell lands of his intestate was addressed: "To the Hon. H. M. Wead, Judge of the Tenth Judicial Circuit, in chancery sitting," or to the equitable jurisdiction of the court: *Held*, that the petition was not addressed to the chancery side of the court, but to the judge; and that as no form was prescribed, if it contained the substantial requirements of the statute it was sufficient, and would be considered as presented and carried on under the statute.

11. *SAME—account of personalty.* Where the administrator's petition for a decree to sell real estate, avers that there was no personal estate, an objection that no account or inventory of the personal estate and debts was filed, is untenable.

12. *ADMINISTRATOR'S SALE OF LAND—proof of indebtedness.* In this case the only evidence before the circuit court of the existence of indebtedness against the estate, was a record from the county court of H. County, Ky., but the same had not been allowed by the county court in the county granting administration in this State. It was held, that if this were conceded to be error, yet it could not affect the jurisdiction of the court, and that the sale under the decree could not be questioned for such error in a collateral proceeding.

13. The statute in force in 1853, regulating sales of real estate by administrators, did not require that the court should confirm a sale made under its order.

14. *STATUTE—construed.* The word "seized" in sec. 103 of chap. of Wills, R. S. 1845, as used in reference to the lands of deceased persons, construed to mean possessed or owned. In this section and section 125, seizin and ownership are used as synonymous.

15. *JUDGMENT OR DECREE—validity in a collateral proceeding.* It matters not how erroneous the findings, judgments, and decrees of a court of general jurisdiction may be, when drawn in question collaterally, if the court had jurisdiction of the subject matter and of the parties. They can not be questioned collaterally for mere errors or irregularities.

16. *REVERSAL—effect on rights of purchaser.* The law is well settled on grounds of public policy, that the rights of persons, not parties to the record, or privies, acquired under judicial sales, when the court had jurisdiction, will not be affected by a subsequent reversal of the decree or order under which they were acquired.

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17. **ACKNOWLEDGMENT OF DEED.** An objection that a deed admitted in evidence was defectively acknowledged will be obviated by proof of its execution.

18. **ADMINISTRATOR'S DEED**—*to an assignee.* On the trial of an action of ejectment, an administrator's deed was objected to, because it was not made to the purchaser at the sale, but to his assignee: *Held*, that this objection could not be made by the heirs of the intestate or those claiming under them. The title claimed by them was divested by the sale, and they had no interest in the question whether the purchaser or his assignee was entitled to the conveyance.

APPEAL from the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. GOUDY & CHANDLER, and Mr. J. M. KIRKPATRICK, for the appellants.

Messrs. MILLER, FROST & LEWIS, and Mr. JOHN J. GLENN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

The points made by appellants on this record, have been decided adversely to them by this court, as reference to cases will show.

Their first point is, that the decree of the Warren circuit court, and the sale thereunder to Duhme, and the deed by the administrator to Love, are null and void.

This point is based on the fact that, as the intestate died in the State of Kentucky, possessed of lands in this State, the statute then in force required administration on his estate to be committed to the public administrator, on the application of any person interested therein, if the deceased had no relative or creditor in this State, or having any, they declined to take the administration.

Paine, it is said, was neither a relative nor creditor, and not interested in the estate; his appointment was void, consequently, all acts done by him as such, are also void.

We do not think this objection, if it be one, can be raised here. If urged before the court granting the letters, it might

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have prevailed. That court was clothed with full power in the matter, and had complete jurisdiction over the subject; and, having acted, though erroneously, it may be, its action must be regarded as valid and binding in every collateral proceeding. Until the letters granted to Paine are revoked, they must be operative and effectual for the purposes intended. We must, in this proceeding, presume the court granting the letters, had satisfactory evidence before it to justify its action. There may have been facts before that court, calling it into action, which the law does not require should be preserved in the record, or in any other manner. *Schnell v. City of Chicago*, 38 Ill. 390. The case of *Bowles' heirs v. Rouse, Adm'r* 3 Gilm. 409, cited by appellants' counsel, was a direct proceeding to reverse the order of sale, and can not apply to this case.

The next point made by appellants is, a want of power in the circuit court to render the decree, jurisdiction not having been acquired of the person, or subject matter, as required by the statute.

We are at a loss to perceive wherein the circuit court failed to obtain jurisdiction in this case, both as it regards the persons of the heirs, and of the subject matter. The initiatory proceedings are in substantial compliance with the requirements of Section 103, Ch. 109, Title "Wills," and seem to meet all its demands. A petition was filed in the proper court by the administrator, stating the purpose, and notice by publication to the heirs was given. The statute gives the administrator the choice of two modes by which to bring the heirs into court; the one is, by serving a written or printed notice of the application, together with a copy of the account and petition on each of the heirs, or their guardians; the other is, by publishing a notice to all parties interested, in the nearest newspaper for three weeks successively, so that they may come in and show cause why the land should not be sold according to the prayer of the petition. One mode is as efficacious as the other, to bring the heirs and all interested parties into court, and thus give jurisdiction to the court. Whichever mode may be adopted, in neither is it required that the names of the heirs or other interested parties shall be inserted in the notice.

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The notice was as follows :

To all persons interested, take notice that I intend to present a petition to the circuit court at its next term, to be holden in Monmouth, in the county of Warren, and State of Illinois, on the third Monday of October, A. D. 1853, praying said court for an order to sell all of the real estate belonging to the estate of Bushnell Willey, deceased, for the purpose of paying the debts against said estate. Signed by the administrator, and dated, "Monmouth, Illinois, August 2d, 1853." This notice was published for the time required by the statute.

As to the petition, the requirement is, that "the administrator shall make out a petition to the circuit court of the county in which administration shall have been granted, stating therein what real estate the testator or intestate died seized of, or so much thereof as will be necessary to pay his or her debts as aforesaid, and request the aid of the court in the premises."

This is all the statute requires shall be stated in the petition, and this court can require no more. The petition in question fulfills this requirement, with this difference, it does not state the intestate died seized of the lands described in the petition, or of any lands. The allegation is, after stating the personal assets were exhausted and a large balance remained due by the intestate, "that to pay the debts there only remained the real estate belonging to the estate," describing it.

No technical seizin is alleged in the intestate, but we do not consider that important, so long as there is found an allegation equivalent to it. Seizin, in fact, is understood to be actual possession of land, but in the sense in which the legislature used it, ownership of land was meant—land which the deceased owned in his life-time—that which belonged to him, and into the possession of which he had a right to enter. It is well known there are very many cases of large landed proprietors dying who never saw their lands, yet they were seized in law because they had the title and a right to the actual possession. In this sense the term was used in section 103, as is fully shown by section 125, which provides, whenever it shall appear that the personal estate of any person deceased is insufficient to dis-

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charge the debts of such estate, and there is real estate belonging to the same, the court of probate shall make out an abstract from the record of the debts and credits of such estate, and of the lands owned by such testator or intestate from the inventory of such estate, whether the title be complete or not, etc. Seizin and ownership are used as synonymous.

That the heirs are not named in the petition is no objection. It was intimated in the case of *Turney v. Turney*, 24 Ill. 625, otherwise, but on further consideration it was held in *Gibson v. Roll*, 27 id. 88, and subsequently in *Stow v. Kimball*, 28 id. 93, and *Morris v. Hogle*, 37 id. 155, the omission to name the heirs did not invalidate the decree of sale.

As to the objection that the notice of the administrator is, that he will apply for an order to sell all the lands of the intestate, instead of "the whole, or so much of them as will be sufficient to pay his debts," it is sufficient in answer to say, that the statute prescribes no particular form of notice. It is for the court to judge of its sufficiency. The notice itself, fully apprizes all parties interested of the nature of the application, and the time and place when and where it will be made. On hearing the allegations and proofs the court may, in its discretion, restrict the sale to a portion only of the lands.

Nor do we perceive the force of the objection that the notice did not request all persons interested in the estate to show cause why the land should not be sold for the purpose of paying the debts. The notice was directed to "all persons interested," and if they deemed it important to be present they could appear without any other request. The notice was in fact a request to them to appear.

This court held, in *Charles v. Waugh*, 35 Ill. 315, that a notice by a collector of taxes on an application for judgment against delinquent lands, which omitted to state that an order of sale would be applied for at the time application for judgment should be made, was insufficient, for the reason, land owners would not be stimulated to the same diligence they would be if they were notified that an order to sell their land would be applied for and would follow the judgment. It has always been

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held in cases of sales of land for taxes, by which the estate of one man may be divested and transferred to another, every material provision of the statute must be complied with. The notice in question did not comply with the statute, and, therefore, no power existed in the court to grant an order of sale. The same strictness has not been required in proceedings of the kind we are now considering.

The sufficiency of this notice in all its particulars, has been adjudicated upon in the original proceeding, the court having found by its decree that it appeared to the court that due notice of its pendency had been given by publication, etc. This recital is *prima facie* evidence at least that the notice required by law had been given. *Goudy et al. v. Hall*, 30 Ill. 109; *Finch v. Sink*, 46 id. 169.

The objection that this proceeding was addressed to the equitable jurisdiction of the circuit court, and was not an application under the statute, is without force. It matters not how informal the proceeding may be, as the statute prescribes no particular form. If the substance is in the petition, it will suffice, however much incongruous matter may get into it. It is evident from the whole tenor of the proceedings, from the notice to the final order of sale, they were instituted and carried on under the statute. The case of *Cost v. Rose*, 17 Ill. 276, cited in support of this objection, was a proceeding in partition in regard to which, as was said in *Goudy v. Hall*, 36 id. 313, the court had both a statutory and general chancery jurisdiction, and the address of the bill was then held, as it was addressed to the court "in chancery sitting," to indicate the intention of the party as to which jurisdiction he sought to call into action. As was said in the last cited case, so here, the court could not take jurisdiction of an administrator's petition of this specific character, and grant the particular relief sought, except by virtue of the statute; and the petition clearly shows it was the statutory power of the court that was invoked. And it was further said the action of the court, when collaterally called in question, will be referred either to its general or its statutory powers, as may be necessary to sustain its

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jurisdiction and without reference to such a mere matter of form as the address of the petition.

The petition in question is not addressed to the chancery side of the court, but to the judge of the court, in the usual form.

The rule is well settled in this court that a petition is sufficient if it states enough to require the court to act. *Iverson v. Loberg*, 26 id. 179.

The objection that no account of the personal estate and debts was filed by the administrator, is answered by the fact that it is averred in the petition there was no personal estate, and that the unpaid debts amounted to about \$10,000. But it is objected those debts had not been presented and allowed by the probate court. The only evidence to establish the existence of those debts was the record from the county court of Harrison County, Kentucky, which, under the act of Congress, has the same force and effect, if properly authenticated, in this State that it had in the State of its origin.

It may be admitted, for the purpose of this case, that the circuit court erred in holding it was unnecessary, to an order of sale, that the debts should be presented and allowed by the probate court of Warren County; but that does not affect the question of jurisdiction. The jurisdiction being established, no matter how erroneous the finding of the court may be, the finding is not void, and can not be questioned in a collateral proceeding. This is the universal rule in all courts of common law. *Buckmaster v. Carlin*, 3 Scam. 104; *Swiggart v. Harber*, 4 id. 364; *Rockwell v. Jones*, 21 id. 279; *Chestnut v. Marsh*, 12 id. 173; *Weiner v. Heintz*, 17 id. 259; *Horton v. Critchfield*, 18 id. 133; *Iverson v. Loberg*, *supra*; *Goudy v. Hall*, *supra*. The later cases are *Wimberly v. Hurst*, 33 Ill. 166; *Wight v. Wallbaum*, 39 id. 555; *Elston v. City of Chicago*, 40 id. 514; *Mulford v. Stalzenback*, 46 id. 303; *Huls v. Buntin*, 47 id. 396.

This court said in this case, when before us in a direct proceeding to reverse the order of sale, that the order was made in a case not contemplated by the statute, and for pay-

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ing supposed debts with which the administrator had not the remotest concern. *Hobson et al. v. Payne*, Adm'r. 45 Ill. 158.

The amount of which is, simply, that the court erred in ordering a sale to pay such debts, but having jurisdiction of the subject, its judgment was not void, but erroneous only. The case of *Stow v. Kimball*, 28 Ill. 110, is decisive on this point.

The objection that no account or inventory was filed by the administrator, is answered by the fact that the petition alleges there was no personal estate; of course no account could be made of that which was not; nor could any inventory be made. But these matters are not jurisdictional. Most of the cases cited by appellants are in direct proceedings to reverse for error.

The point that the decree was erroneous and has been reversed, leaving Duhme, the purchaser, not in a condition to hold the title, nor the persons claiming under him, is not tenable. In *Goudy v. Hall*, 86 Ill. 313, this court said, if the court has jurisdiction to render the judgment or to pronounce the decree, that is, if it has jurisdiction over the parties and the subject-matter, then, upon principles of universal law, acts performed and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal. The necessity of this rule, as founded upon important considerations of public policy, is too apparent to admit of dispute. When the validity of acts done under a judicial proceeding is collaterally called in question, we have to look only to the jurisdiction, and if that is found to have existed, then it matters not how erroneous the proceedings of the court may have been, the rights of third persons, acquired while such proceedings were unreversed, and, by virtue of them, must be protected. A great number of cases are there referred to, and we desire to add nothing to what is said in them. The point is made that the parties here were not shown to be *bona fide* purchasers, and that the reversal of the judgment takes away their rights. The question of the good faith of the transaction is not in the case, and we

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know of no rule of law requiring it to be shown in a case of this kind. Good faith is presumed until the contrary is shown. A purchaser under an execution issued upon a judgment in his own favor, is, equitably, bound to make restoration to the judgment debtor on a reversal of the judgment, because he is a privy and a party to the error, and equity will not allow him to profit by his own error. The present defendants in the ejectment, are, so far as we know, innocent purchasers without notice of any infirmity in the title. Whatever irregularities may have occurred between the administrator and the purchaser, they are not jurisdictional, and, on well established principles, can not affect them. The purchaser at the administrator's sale satisfied the administrator as to the payment of his bid, and if the administrator in his acts, in this regard, did not conform in all respects to the law, he may be responsible to the creditors and to others having an interest therein. These defendants have been in possession of these lands many years, making valuable improvements thereon, and have strong equities in their favor, which courts must respect.

As to the objection that the sale by the administrator has not been confirmed by the court, and that the court refused to confirm it, on a motion for that purpose, it is sufficient to say the statute, authorizing the sale, does not require the subsequent confirmation of the court. It is not necessary to the validity of the sale. *Stow v. Kimball*, *supra*. *Reynolds v. Wilson*, 15 Ill. 394, cited by appellants, was a direct proceeding by writ of error from the original decree overruling a motion for confirmation of the sale, and has no bearing on the question before us.

The remaining objections are: 1. That the deed of the administrator to Love was not acknowledged according to law. This is obviated by the testimony of the grantor of the actual execution of the deed. 2. The deed was not executed to Duhme, the purchaser, but to his assignee, Love. In *Dickerman v. Burgess*, 20 Ill. 275, we said the sheriff could not execute a deed to a stranger, and reference was

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made to *Davis v. McVickers*, 11 id. 329, where it was held such deed must be made to the purchaser or to the assignee of the certificate of purchase, or in case of the death of the purchaser to his legal representatives.

Love was the assignee of the certificate of purchase, and it was wholly immaterial to appellants to whom the deed was made, their title having been divested by the sale. They have no interest in the question. If there can be a question raised on this point it must be between the purchaser and the assignee.

We have examined and disposed of all the points raised on this record, and, as we said at the outset, they have been decided adversely to appellants, by numerous decisions of this court, in which we express our full concurrence.

There being no error in this record the judgment must be affirmed.

Judgment affirmed.

WALKER, J., took no part in the decision of this case, as he tried the case in which the decree for the sale of the land was rendered.

RUDOLPH E. SCHULTZ, impleaded, etc.,

v.

JOHN HAY.

MECHANICS' LIEN—*by sub-contractor.* In a suit by a sub-contractor against the owner of a building to recover for labor performed on defendant's house, which he did under the contractor, it appeared that the contractor had abandoned the work and that defendant had fully paid him all he was entitled to before receiving any notice of the plaintiff's claim: *Held*, that the plaintiff was not entitled to recover.

APPEAL from the Circuit Court of Cook County; the
HON. JOHN G. ROGERS, Judge, presiding.

Mr. A. T. EWING, for the appellant.

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Per CURIAM: Appellee sought to recover for work and labor performed and materials furnished in the building of a house.

Appellant had contracted with one Hayman to build his house, for a certain sum; Hayman progressed with the work for some time and then abandoned it, and was fully paid for all that he had done.

This payment was made before any notice was given by appellee, under the act amendatory of the Mechanics' Lien Law, approved April 5, 1869 (Sess. Laws, 1869, 255), that he would hold the building liable for his labor and materials.

The fair construction of this statute is, that the sub-contractor, mechanic, or workman shall not have a lien until the required notice is given to the owner or lessee.

When the notice was given in this case the contractor had failed to complete his contract; and there was no money due to him from the owner.

The remedy of appellee, if any, is under Section 7 of the act referred to.

The judgment is reversed and the cause remanded.

Judgment reversed.

MATTHEW MOORE *et al.*

v.

THOMAS J. PICKETT *et al.*

1. TRUST—*agent*. Where the owner of land which had been sold under execution, made an arrangement with his tenant to redeem the same, and the tenant took an assignment of the certificate of purchase in his own name, while acting as the agent of the owner, his landlord, and afterward procured the sheriff to make a deed to himself instead of to his principal, it seems that this in equity will constitute such agent the trustee of the principal.

2. STATUTE OF FRAUDS—*writing to take out of*. Where a party acquires title to land in trust for another and writes to such other party a letter showing

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clearly that he holds the same in trust, this will be sufficient to manifest the trust as required by the statute of frauds; and where the letter fails to describe the lands, it may be shown by the facts and circumstances surrounding the case that it referred to land in dispute.

APPEAL from the Circuit Court of Tazewell County; the Hon. CHARLES TURNER, Judge, presiding.

Thomas J. Pickett was the owner of the land in controversy, which was sold in two parcels by the sheriff on execution against Pickett. The land was occupied by Matthew Moore, as the tenant of Pickett. The time for redeeming from this sale through judgment creditors expired Feb. 21, 1863. The bill alleged that, long before this Moore entered into an agreement with Pickett to redeem the land, for which the latter was to pay him the amount of the redemption money, with interest, less the amount of rent due from Moore to Pickett. Moore, as such agent, purchased the certificates of purchase, taking an assignment to himself; on Oct. 26, 1863, the sheriff executed deeds to Moore for the lands; on March 30, 1863, Moore wrote a letter to Pickett, stating that he had borrowed the money and paid it in time to save the land; that the parties wanted the money, which saved the expense of getting a judgment on Pickett under which to redeem; that the taxes would have to be paid soon; and stated at length what he had done on the place, and asked for instructions and directions, etc. The bill was filed for an account to be taken, and prayed that upon payment to Moore of the redemption money, less the rents, he be decreed to convey by deed the land, and surrender possession.

The answers set up the statute of frauds, and denied the facts stated in the bill.

The circuit court found the amount due, and directed the master in chancery to execute deed upon its payment.

Mr. B. S. PRETTYMAN and Mr. J. B. RICE, for the appellants.

Opinion of the Court.

Mr. C. A. ROBERTS and N. W. GREEN, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

On the 21st day of November, 1861, Thomas J. Pickett, the complainant, being the owner of the premises in question, two parcels of land situate in the county of Tazewell, the same were sold at sheriff's sale under an execution against him to two several purchasers and certificates of purchase issued to them.

The time for the redemption of the premises from the sale, as against judgment creditors, would have expired February 21, 1863, about which time the holders of the certificates assigned them to Matthew Moore, the original defendant in this suit, he then being a tenant of the premises under Pickett, and the latter a resident of the State of Kentucky. On the 26th day of February, 1863, the sheriff's deed of the premises was executed to Moore as assignee of the certificates of purchase.

The questions presented by the record are, in what capacity did Moore obtain this title, whether as purchaser for himself, or as the agent of Pickett in redeeming the property for him; and, if in the latter capacity, whether there is sufficient evidence of the fact to charge him under the statute of frauds, which is set up in the answer.

The proofs satisfactorily show that Moore, at the time he took the assignment of the certificates of purchase, was acting as the agent of Pickett in redeeming the land for him, and if so, taking the assignment in his, Moore's own name, as also the subsequent sheriff's deed, constituted him the trustee of Pickett. 1 Story Eq. Jur. § 316; *Dennis et al. v. McCagg et al.* 32 Ill. 429.

Although twelve months, the time limited for Pickett to redeem from the sale, had expired, he yet, within the fifteen months allowed for judgment creditors to redeem, might have redeemed indirectly, through the means of a judgment creditor, by having a judgment obtained against him for that purpose; and that course seems to have been contemplated by the parties,

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as appears from Moore's letter to Pickett, wherein he speaks of the holders of the certificates of purchase being glad to get their money, without his getting a judgment against Pickett in the circuit court, which saved considerable expense.

We think, too, this trust is sufficiently manifested and proved by a writing signed by Moore, as required by the statute of frauds, and that is, the letter from Moore to Pickett of the date of March 30, 1863, taken in connection with the surrounding facts and circumstances in proof. Those facts and circumstances serve to identify the subject-matter of the letter as the premises in question.

The letter, which is too lengthy for insertion here, characterizes the proceeding as a redemption and not as a purchase; it shows the existence of a previous engagement to redeem the lands; acts of Moore in respect to the land are therein submitted to Pickett for approval; he asks directions for the future in regard to the premises, and permission from Pickett to fix a division fence between them and Leonard's land. Nowhere in the letter is there an indication of any claim to the land as owner, by Moore, but on the contrary it throughout recognizes Pickett as the owner and himself as acting for Pickett, and in his behalf in redeeming the land.

The decree must be affirmed.

Decree affirmed.

TRUSTEES OF THE CONGREGATIONAL SOCIETY OF EVANSTON

62	161
124	626

v.

JOSEPH HUBBLE.

1. CONTRACT—*services under special contract—recovery without full performance.* In an action to recover for work and labor done, and materials furnished, in the erection of a church, it appeared there was a special contract to complete the building by a certain day at a certain price, payable in installments, and that the plaintiff did not complete the same, defendants claiming that he had abandoned the work. The court instructed the jury for the plaintiff, that if they believed "from the evidence, that defendants commit-

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ted the first breach of the contract by ignoring their obligations under it, and on account of such breach by the defendants the plaintiff is entitled to recover for the full amount of the work done by him at the time the defendants took possession of the building, to be estimated according to the original contract price, if the jury find from the evidence that such work has not been all paid for." *Held*, that the instruction was obscure and calculated to mislead. The breach of defendants relied on to justify an abandonment should have been stated and left to the jury to be found from the evidence.

2. *SAME—recovery on partial performance.* In an action seeking to recover for services on partial performance of a special contract on the ground of cause for not fully performing, where there was proof of payment, it is error to instruct the jury that if there was cause for abandoning the work before completion, the plaintiff is entitled to recover for the full amount of the work done according to the contract price, provided the work had not all been paid for. It should have authorized the recovery of the unpaid balance only.

APPEAL from the Superior Court of Cook County; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. H. A. WHITE and Mr. W. T. BURGESS, for the appellants.

Mr. JOHN W. KREAMER and Mr. H. B. HURD, for the appellee.

Per CURIAM: This was an action of assumpsit, brought by Hubble to recover for work and labor done, and materials furnished by him toward the erection of a church edifice for this society.

The facts in evidence disclose that a contract in writing was entered into between the parties for the work and materials for this building, to be completed by the 15th day of June, 1869, for \$7,700, to be paid, excepting twenty per cent of it, by installments, as the work progressed.

Hubble not having completed the building by the time specified, and having, as claimed, abandoned the work, the trustees of the society employed other workmen and completed the work themselves.

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The trial resulted in a verdict and judgment in favor of the plaintiff below, and the defendants appealed.

We deem it unnecessary to notice more than one of the assignments of error, and that is, in the giving of the seventh instruction for the plaintiff, which was as follows :

7. "If the jury believe, from the evidence, and under the instructions, that the defendants committed the first breach of the contract, by ignoring their obligations under it, and on account of such breach by the defendants, the plaintiff is entitled to recover for the full amount of the work done by him at the time the defendants took possession of the building, to be estimated according to the original contract price, if the jury find, from the evidence, that such work has not been all paid for."

This instruction was obscure, and calculated to mislead the jury. They were left to wander in a field of too much conjecture and indefiniteness in finding whether the defendants had ignored their obligations under their contract.

They might have considered the defendants had done that, although they had actually kept their contract. It was in evidence that the defendants asked a bond of the plaintiff, to secure them against the liens of sub-contractors in payments they should make; and this might have been deemed "ignoring their obligations under" the contract, although there might not have been any breach of the contract in not making any payment that was due according to its terms. Whatever act or omission might have been relied upon as constituting a breach of the contract, the jury should have been left to find that specific fact.

The instruction also authorized the jury, in case they found that the work done by the plaintiff had not all been paid for, to find for the plaintiff for the full amount of the work done by him, instead of for the unpaid portion of it—it being in evidence that payments had been made for the work.

For error in giving this instruction the judgment is reversed and the cause remanded.

Judgment reversed.

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ALVAH D. DREW

v.

LEONARD W. BEALL.

1. **BILL OF EXCEPTIONS—instructions.** When the bill of exceptions does not contain any instructions or any ruling of the court thereon, nor exception to any such ruling, this court can not take notice of any. The fact that the clerk has copied into the transcript the instructions given and refused and exceptions, does not make them a part of the record. This can be done only by incorporating them into the bill of exceptions.

2. **NEW TRIAL—exception.** The overruling of a motion for a new trial can not be assigned for error when the bill of exceptions fails to show an exception taken to the ruling of the court.

3. **EVIDENCE—cross-examination.** The plaintiff, as a witness in his own behalf, was asked the value of certain land. He had already shown that he was competent to give an opinion of the value of the land. The defendant asked leave to cross-examine him as to his means of knowledge before answering the question, which the court refused: *Held*, no error.

4. **EVIDENCE—to show fraud in sale.** In an action to recover damages for fraud and deceit in the sale or exchange of land—consisting of false representations as to the nature, quality, and value of the land sold—a witness was asked whether defendant told him a certain other person had shown him the land: *Held*, that the question was clearly proper. Whether defendant had seen the land or not, had a material bearing on the question of fraud.

5. **HEARSAY EVIDENCE.** The defendant in a suit brought to recover damages on the ground of false and fraudulent representations made by him in effecting a sale of Missouri lands to plaintiff, produced a witness who had entered the land and had sold the same to one H, and asked the witness, "What did H say to you in connection with the buying?" *Held*, that an objection to the question was properly sustained as calling for mere hearsay testimony.

6. **EVIDENCE—on question of fraud.** In the same case the defendant testified that he bought the land of one H, and was then asked, "How much did H tell you was prairie and how much timber, at the time you purchased of him?" The court sustained plaintiff's objection to the question. It appeared that this took place about eleven years before the sale to plaintiff, and defendant's representations as to the character and quality of the land from personal knowledge acquired about three years before the sale: *Held*, that while the statements of H to defendant might not have been altogether irrelevant as affecting defendant's honest belief of the condition and quality

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of the land sold to plaintiff, and, therefore, admissible, yet its weight as evidence was so light, in view of the other facts, that its rejection could not be looked upon as a substantial error.

7. *FRAUD—in exchange of property—measure of damages.* Where the plaintiff was induced by fraudulent representations of defendant as to the condition of certain Missouri land, which proved to be untrue, to give in exchange a house and lot for the land and \$800 in money, and deeds were made each to the other for the property exchanged, it was *held* the plaintiff was entitled, under the contract, to have such a tract of land as it was represented to be; and if he did not get it, the measure of damages was the difference between the actual value of the land and the value of the same if it had been such as it was represented.

8. *SAME—evidence.* After an exchange of a house and lot by plaintiff with defendant for a tract of Missouri land and \$800, effected by fraudulent representations of defendant as to the condition, quality, and value of the Missouri land, the defendant, when sued in an action on the case for the fraud and deceit, offered to prove the value of the house and lot he received of plaintiff as affecting the question of damages, which the court refused to allow: *Held*, that the proof was properly rejected, as the plaintiff was entitled to the benefit of his bargain; and it was not for the jury to make a new contract for the parties or fix a new price on plaintiff's property for the parties.

APPEAL from the Circuit Court of Lee County; the Hon. WILLIAM W. HEATON, Judge, presiding.

The opinion of the court contains a sufficient statement of the case.

Messrs. EUSTACE, BARGE & DIXON, for the appellant.

Mr. JAMES K. EDSALL, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on the case brought by Beall against Drew in the Lee circuit court to recover damages for the deceit and fraud alleged to have been practiced by the latter upon the former, in the sale and exchange of certain real estate, whereby Beall sold and conveyed a house and lot in Dixon he owned, for eighty acres of land in Mason County, Missouri, belonging to Drew, and the sum of \$800; the fraud

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charged consisting in alleged fraudulent representations in regard to the Missouri land.

One error assigned is in the giving and refusing of instructions.

The bill of exceptions does not contain any instructions, nor show any ruling of the court thereon, nor exception to any such ruling. Consequently, no instructions appear in the record, and we can not take notice of any. The clerk has copied into the transcript made by him instructions, as given and refused, and exceptions to giving and refusing them ; but that does not show that they are a part of the record. They can only become such by being incorporated into the record by means of a bill of exceptions, as repeatedly ruled by this court. *Saunders v. McCollins*, 4 Scam. 419; *Corey v. Russell*, 3 Gilm. 367; *Petty v. Scott*, 5 id. 209; *Magher v. Howe*, 12 Ill. 379; *Moss v. Flint*, 13 id. 571; *Smith v. Wilson*, 26 id. 186; *Ballance v. Leonard*, 37 id. 43; *Gill v. People*, 42 id. 321; *Hartford Fire Ins. Co. v. Vanduzer*, 49 id. 491.

This disposes, too, of the error assigned in overruling defendant's motion for a new trial.

Objections are taken to various rulings of the court upon the trial, which will be considered.

The plaintiff, on his direct examination, was asked his opinion as to the value of the Missouri land in the fall of 1869. The defendant asked leave to cross-examine him as to his means of knowledge before his answering the question, which the court refused to allow. The witness had already disclosed enough by his testimony to show that he was competent to give an opinion as to the value of the land, and the defendant in such a case was properly denied the privilege to cross-examine the witness as to his means of knowledge, until his examination in chief had been concluded.

In the examination of the witness Kneinin, he was asked by plaintiff's counsel, whether defendant told him Gray had shown him the land; objection was made to the question by defendant's counsel, which was overruled by the court and

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excepted to, and the witness replied, "He said that Gray said it was worth \$18 per acre."

No motion was made to exclude the answer, and whatever may be said as to the answer, the question propounded to the witness was clearly proper—as whether the defendant had seen the land or not, had a material bearing upon the question of fraud.

Evidence of what Hayes, who had bought the land of the witness Scott, said to the witness, in connection with the buying, was properly rejected, as being mere hearsay testimony.

The defendant, on his examination, had testified that he bought the land of John D. Heaton, and was thereupon asked, "How much did Heaton tell you was prairie and how much timber, at the time you purchased of him?" The question was objected to, and the objection sustained, and exception taken.

Drew made his representations from his personal knowledge of the land; he had visited it in 1866. The statements were in regard to the condition and quality of the land at the time of the sale and exchange in 1869. Whatever timber had ever been upon the land, seems, at that time, to have been mostly cut off. What Heaton told the defendant at the time he sold him the land, eleven years before, might not have been altogether irrelevant, as affecting the question of the defendant's honest belief of the condition and quality of the land at the time he sold to Beall, and might properly have been admitted; but the weight to which it was entitled as evidence in this respect was so light, in view of the other testimony in the case, that its rejection can not be looked upon as a substantial error.

The court rejected evidence of the value of the house and lot in Dixon.

It is insisted this was admissible as affecting the question of damages; that the jury had a right to believe, from the evidence, that the contract was, that Beall agreed to sell his house and lot for \$800, and this Missouri land represented to

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be of a certain character; that he conveyed the house and lot, and received the \$800 and the deed of the land.

Then if it appeared that Beall had been fraudulently deceived as to the land, his damages would be the value of his house and lot, less the \$800, and less the actual value of the land; that this would restore the plaintiff to the condition he was in before the bargain was made, and be all he was entitled to receive as damages.

According to this rule, had the proof been, that the Dixon property was worth no more than \$800, as the plaintiff had received that sum in the trade, he would not be entitled to recover any damages, however great the difference between the value of the land as it was, and what it would have been if as represented to be. The parties had, by their agreement, fixed an estimate and value upon the property which each sold and transferred to the other, and it was not for the jury to make a new contract for them, or fix a new price upon the plaintiff's property for them.

The plaintiff was entitled to the benefit of his bargain.

The defendant had received the consideration agreed to be paid by the plaintiff, and the latter was entitled to have such a tract of land as this was represented to be, and if he has not got it, his damages, by reason of not getting it; and the proper measure of damages, we think, is the difference between the actual value of the land, and the value of such a piece of land as this was represented to be by the defendant.

Such is the measure of damages in an action for breach of a warranty on a sale of personal property. *Wallace v. Wren*, 32 Ill. 146; *Woodworth v. Woodburn*, 20 id. 184. And it is the same in an action for a deceit in a sale. *Stiles v. White et al.* 11 Metc. 356. And the same rule seems to obtain upon the sale of real estate where the action is for deceit in relation to its quality or condition. *Whitney v. Allaire*, 1 Comst. 305.

We think, then, an inquiry into the value of the Dixon house and lot was not properly involved, and that the court rightly rejected evidence in regard to it.

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Perceiving no error in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

JOHN MCINHILL

v.

ABRAHAM ODELL *et al.*

1. **LEGAL TENDER.** A decree on the foreclosure of a mortgage required the payment of the sum found due to be paid in gold coin. The note and mortgage were made before the passage of the legal tender act, and contained no provision as to what kind of money should be paid, but were in the usual form for the payment of so many dollars: *Held*, that the decree in this respect was erroneous.

2. **SUPREME COURT OF THE UNITED STATES—decisions when binding on this court.** The decisions of the Supreme Court of the United States upon questions arising under the Federal Constitution are binding upon this court.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

This was a bill to foreclose two mortgages given to secure two promissory notes. Neither the notes nor mortgages provided for payment in gold, but they were in the ordinary form. They were made before the passage of the legal tender act.

Mr. B. F. PARKS, for the appellant.

Mr. C. J. METZNER, for the appellees.

Per CURIAM: The decree in this case, so far as it requires the amount found due to be paid in gold, must, under the authority of the cases reported in 11 Wallace

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682, under the title of legal tender cases, be reversed. The cases referred to are the latest decisions of the Supreme Court of the United States upon that subject, and are binding upon us, since the question involved arises under the Constitution of the United States.

The answer claims a homestead for John McInhill, but admits the fee to have been in Edward McInhill. The record contains nothing showing a homestead right in John McInhill. Decree reversed and cause remanded.

Decree reversed.

ANDREW M. WILEY *et al.*

v.

EDWARD C. SILLIMAN *et al.*

1. MUNICIPAL SUBSCRIPTION—*election—excess of authority.* By the charter of the Dixon, Peoria & Hannibal Railroad Company, of March 5, 1867, each town and township through which the road might be located was authorized to subscribe and take stock of the company not exceeding \$35,000, upon a vote of the people in favor of the same. Under this law an election was had in the township of Elmwood upon two propositions for subscription, the first for \$35,000 and the other for \$40,000 additional to the first, both of which were carried and the bonds of the township issued: *Held*, on bill to enjoin the collection of taxes to pay the interest of the bonds that the subscription of \$35,000 was valid, but as to the \$40,000, the election and subscription were void, and a decree dismissing the bill was reversed.

2. SAME—*notice of election.* The charter required twenty days' notice of an election to authorize a municipal subscription to the company. The election was called and notices thereof given under the charter, and pending such call, and, after posting notice, the legislature passed an act authorizing towns to subscribe \$100,000 to this company—but no new notice was given under this act, and the election was held seven days after its passage: *Held*, that the amendatory act could not affect such election, and render a vote for a sum in excess of \$35,000 valid.

3. SAME—*curative act—power of legislature.* Where the people of a township at an election voted in favor of a subscription of \$40,000 to a railroad

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company without any authority of law, the general assembly afterward passed a special act declaring the election and subscription made under it to be legalized and binding upon the township: *Held*, that as the election and subscription were null and void, and as the legislature could not create a debt against a municipal corporation without its consent, the curative act was void.

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was a bill in chancery by appellants in behalf of themselves and sixty-one other persons named, and all others interested, to enjoin the collection of a tax levied to pay interest on bonds issued by the township authorities, which bonds were claimed to be illegal.

The bill was filed in the circuit court of Peoria County and taken to Knox County on change of venue.

The facts bearing upon the merits are stated in the opinion of the court in *Marshall v. Silliman*, 61 Ill. 218. On the hearing the injunction was dissolved and the bill dismissed.

Messrs. WEAD & JACK, for the appellants.

Messrs. HARDING, MCCOY, & JOHN S. STEVENS, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This case is, in all its substantial particulars, like the case of *Marshall v. Silliman*, 61 Ill. 218, the difference being that this relates to bonds issued by the town of Elmwood and the other to bonds issued by the town of Brimfield. The two cases have been submitted on substantially the same briefs. In the other case we found the \$15,000 subscription to be invalid, and the others binding. Here we have two subscriptions, one for \$35,000 and one for \$40,000. This last for the \$40,000 was void, for the reasons given in

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the other case in reference to the \$15,000. The election was held March 16, 1869, on a notice posted by the supervisors February 16, 1869. When the notice was posted the charter of the company only authorized a subscription for \$35,000. That was voted on the same day under a proper notice issued in compliance with the provisions of the charter. The notice under which the vote for the \$40,000 was held, was, as in the other case, a mere call for a special town meeting, signed by only twelve voters, and did not seek to follow the provisions of the charter, as indeed it could not do, since the power under that had already been exhausted. It is true that, on the 9th of March, 1869, the legislature passed another act authorizing towns to subscribe \$100,000, but a new notice was not given. The charter required twenty days' notice, and only seven intervened between the passage of the amendatory act and the vote.

On the 17th of April, 1869, the legislature passed a curative act, the same, in substance, as that already considered in the other case, and on this counsel for appellee place their reliance. We have sufficiently considered it in the other case.

The subscription for the \$35,000 was valid. That for the \$40,000 was not.

Decree reversed.

CYRUS NEWKIRK

v.

LEMUEL MILK *et al.*

1. TEXAS AND CHEROKEE CATTLE—*different owners—which liable for infection.* Where two separate lots of Texas or Cherokee cattle, owned and in the possession of separate owners in this State contrary to the statute of 1867, were each on the same feeding ground or section where the cattle of the plaintiff were being herded, and plaintiff's cattle became infected, from

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which they died, the court, in a suit against the owners of one lot of these cattle, instructed the jury, that if plaintiff's cattle took the disease from either lot of the Texas cattle, and the testimony as to which lot communicated the disease was equally balanced, to find for defendants: *Held*, that the instruction was erroneous. If both lots of cattle contributed to infect plaintiff's cattle, so that it was impossible to say that one lot was more concerned in doing so than the other, it seems that the defendants were liable.

2. In such a case it is not error to refuse an instruction for the plaintiff that if the Texas or Cherokee cattle that were on the section where plaintiff's cattle run, infected plaintiff's cattle with disease, of which they died, then the defendants were liable, and could not be acquitted on the ground that the damages might have accrued from the acts of the owners of the other lot of cattle. If the disease was contracted from the other lot of cattle, defendants were not liable.

3. Neither was it error to refuse an instruction that if Texas or Cherokee cattle imparted the disease to plaintiff's cattle, without limiting it to defendants' cattle, the jury should find defendants guilty.

APPEAL from the Circuit Court of Iroquois County; the Hon. CHARLES H. WOOD, Judge, presiding.

This was an action on the case by the appellant against the appellees, to recover for damages sustained in the loss of cattle by infection from Texas cattle brought by appellees into this State.

Defendants pleaded the general issue. There was a trial, and verdict for appellees.

The following are the refused instructions asked by appellant referred to in the opinion:

1. "That if the jury believe, from the evidence, that the defendants, during the spring and summer of 1868, imported into this State Texas or Cherokee cattle, brought them to Loda, and drove them over section 25, the herding ground of Bosley; and that about the same time, Fowler & Earl, of Indiana, imported into this State Texas or Cherokee cattle, brought them to Paxton, and that several such cattle wandered over the same section 25; and if the jury believe further, from the evidence, that the Texas or Cherokee cattle that were on section 25 did impart a disease to the plaintiff's cattle, of which they died, then both the defendants, Fowler & Earl, would be

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liable to the plaintiff for all damage sustained. They were all trespassers, and the defendants can not be acquitted on the ground that the damage might have accrued from the acts of a co-trespasser.

2. "If the jury believe, from the evidence, that the defendants, and Fowler & Earl, imported Texas or Cherokee cattle into Iroquois County, Illinois, and cattle belonging to the defendants, and also cattle belonging to Fowler & Earl, went over the herding ground where the plaintiff's cattle were, and Texas or Cherokee cattle did impart disease to plaintiff's cattle of which they died; and if the jury believe, from the evidence, that the cattle of defendants and those of Fowler & Earl had the power to impart the disease of which the plaintiff's cattle died, then the jury will find the defendants guilty."

The following is the fifth instruction given for the defendants:

5. "If the jury believe, from the evidence, that the cattle of defendants, and the cattle called Fowler & Earl's, would communicate disease to native cattle, when they, the native cattle, came in contact with the cattle of defendants and of Fowler & Earl; and if the jury believe, from the evidence, that the cattle of plaintiff took a disease of which they died, either from the cattle of Fowler & Earl or from the cattle of defendants; and if they further believe that the testimony is equally balanced as to which of said cattle, defendants' or Fowler & Earl's, they, plaintiff's cattle, took the disease from, then the jury should find a verdict for the defendants."

The proof showed that plaintiff's cattle were herded with Bosley's herd on section 25; that defendants drove their Texas cattle across and over this land; and that Fowler & Earl also brought a lot of the same kind of cattle into the same county to Paxton, and that some of them wandered over the same section where plaintiff's cattle were being herded.

Mr. URIAH COPP, JR., for the appellant.

Messrs. BLADES & KAY, for the appellees.

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Mr. JUSTICE WALKER delivered the opinion of the Court:

In this case the fifth of defendants' instructions given by the court is like that given in the case of *Frazee v. Milk*, 56 Ill. 435, which was held to be erroneous, and for the giving of which the judgment was reversed. That case is decisive of this. The first of plaintiff's refused instructions is too general. Under it, the jury would have been warranted in finding defendant guilty, although appellant's cattle may have contracted the disease of Fowler & Earl's cattle, which were also on the same feeding grounds. Appellees are not liable for the acts of Fowler & Earl unless jointly done, and this instruction asserts the opposite of this doctrine. That instruction was properly refused. The second refused instruction is still more general, as it asserts that appellant could recover, if Texas cattle imparted the disease to his cattle, without limiting it to appellees' or the cattle of any person. It only requires the jury to find that the cattle of Fowler & Earl and those of appellees passed over the feeding ground, and the cattle of appellant contracted the disease from Texas cattle, to entitle him to recover. It does not require the jury to find that the cattle of appellees communicated the disease, as it should have done. It was also properly refused.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

WILLIAM H. DUNNING

v.

ALEX. H. SOUTH, for use, etc.

1. *REPLEVIN—right of possession.* In a suit upon a replevin bond, brought after the dismissal of the replevin suit, the only issue made by the pleadings was, in whom was the right of possession to the crops replevied at the time of suing out the writ of replevin? It appeared that the plaintiff in replevin had leased his farm to the defendant in the replevin suit, reserving the property in the crops as security for the delivery of his share thereof. The jury

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found the right of possession in the tenant, the plaintiff in the suit on the bond: *Held*, that the verdict was right; and although the defendant may have had the property in the crops as a security, yet the right of possession was in the plaintiff.

APPEAL from the Circuit Court of Iroquois County; the Hon. CHARLES H. WOOD, Judge, presiding.

This was debt upon a replevin bond brought in the name of appellee, as sheriff, for the use of William F. Ward. The bond was given in a replevin suit by Dunning, appellant, against Ward, to recover certain crops. The replevin suit was dismissed by the plaintiff. Defendant in that action brought suit on the bond in the sheriff's name. By the pleadings the only issue presented was, whether Ward was entitled to the possession of the property at the time of the bringing of the suit in replevin. It appeared that Ward had rented lands of Dunning, and was to deliver a share of the crops as rent—the lease providing that all crops raised should be and remain the property of Dunning until Ward should comply with his agreement.

Messrs. ROFF, DOYLE & McCULLOUGH, and Messrs. BLADES & KAY, for the appellant.

Messrs. McINTYRE & WRIGHT, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an action of debt on a replevin bond, given in an action of replevin, which had been dismissed by the plaintiff without a trial on the merits, and a defense made under the act of 1847.

The only issue before the jury was, in whom was the right of possession at the time of suing out the writ of replevin?

Under instructions, to which no exception was taken, the jury found for Ward, for whose use the action was brought, and we think correctly.

Though the property in the crops might be in appellant, the possession could not be, for by the very nature of the contract

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it was in Ward who raised them. The property was in appellant only as security that Ward would deliver the one-third of the crop, which he could not do, if it was not in his possession.

Even if Ward had improperly converted the wheat, the contract did not give appellant a right to the tenant's share of the corn and oats. The evidence fully sustains the verdict, and the justice of the case seems to be as the jury have found. The judgment is affirmed.

Judgment affirmed.

JAMES H. BEVERIDGE *et al.*

v.

ANNA MULFORD *et al.*

1. CHANCERY PRACTICE—*hearing*. It is error to proceed to the hearing of a cause in equity and render a final decree therein at the same term of court at which replication is filed to the answer.*

2. SAME. When one of the defendants to a bill in chancery, being interested in the land sought to be affected by the bill, had answered, and the court proceeded to hear the cause and render final decree at the same term at which replication was filed, both as to the defendant who had answered and another defendant who had acquired an interest in the land from his co-defendant, there being no evidence of acquiescence, it was held error. The case as to the defendant who had not answered should not have been finally disposed of before the hearing as to his co-defendant.

WRIT OF ERROR to the Circuit Court of Cook County; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Messrs. CLARK & BEAN, for the plaintiffs in error.

Messrs. MOORE & CAULFIELD, for the defendants in error.

* "After replication is filed, the cause shall be deemed at issue and stand for hearing." Laws 1872, p. 334, sec. 29.

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Per CURIAM: This was a bill in chancery brought in the Cook circuit court on the 5th day of March, 1863, by the heirs of Edward A. Mulford, deceased, to set aside certain deeds made by their guardian on a sale under an order of court, of the lands belonging to the complainants when they were minors.

The bill alleged that the guardian conveyed the ten acres of land in question to one John McHugh, who subsequently conveyed it to John L. Beveridge; that he conveyed the same to James H. Beveridge, one of the plaintiffs in error, who conveyed an undivided two-fifth part of it to Andrew M. Beveridge, the other plaintiff in error.

At the July term, 1863, of said court, on the 8th day of July, James H. Beveridge filed his answer to the bill, denying material averments in it, and setting up equities of his own in the premises.

On the 14th day of July, of the same term, proof of publication of notice to defendants Hannah L. Olmstead, Agnes McClure, William B. Hendershott, and Andrew M. Beveridge, was made, and the bill taken as confessed against them, and a guardian *ad litem* was appointed for the infant defendants, Francis H., Jessie S., and Eliza Olmstead, who filed an answer for them, and thereupon on motion of complainants' solicitor it was ordered that the cause be referred upon the bill of complaint, and the answer of the infant defendants by their guardian *ad litem*, to the master in chancery to take proofs and report.

Afterward at the same term, on the 15th day of July, the complainants filed their replication to the answer of James H. Beveridge. On the 24th day of July, at the same term, the master filed his report in the cause, and thereupon at the same July term the court rendered a final decree as to all the defendants in favor of the complainants, setting aside the guardian's sale to McHugh and all the proceedings and conveyances subsequent thereto.

James H. Beveridge and Andrew M. Beveridge prosecute this writ of error, and assign for error, entering the decree

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against them—they being solely interested in the tract of land in question, and their co-defendants being interested in entirely distinct tracts of land, purchased at the same guardian's sale. It was error to proceed to a hearing of the cause and render a final decree therein at the same term of the court at which the replication was filed. The statute in this respect provides, after replication is filed the cause shall be deemed at issue and stand for hearing at the next term; or, in default of filing such replication, the cause may be set for hearing upon the bill and answer; in which case the answer shall be taken as true, and no evidence shall be received unless it be matter of record to which the answer refers. The cause as to James H. Beveridge, was heard and determined at a term previous to the one at which it stood for hearing by law. This must be deemed irregular as to him, there being no evidence of his acquiescence.

Andrew M. Beveridge held title to two-fifths of the land by deed from James H. Beveridge, and the case as to the former should not have been finally disposed of before the hearing of it as to James H.

For this error, the decree, as respects the two plaintiffs in error, is reversed, and the cause as to them remanded for further proceedings.

Decree reversed.

BENJAMIN BURTON *et al.*

v.

CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*want of confirmation of report.* Where the ordinance of a city ordering the improvement of a street was valid, and it appeared that the commissioners appointed to estimate the total expense to be assessed upon the real estate deemed specially benefited, and that chargeable upon the general fund, acted within their jurisdiction in making their report and estimate of the cost of the work, and the assessment failed only for want of proper notice for confirmation, it seems that such report and ordinance may be adopted in a new proceeding, by a proper reference, which

Opinion of the Court.

conforms as near as may be in manner to that required for a first assessment.

APPEAL from the Superior Court of Chicago.

Messrs. SPAFFORD, McDAID & WILSON, for the appellants.

Mr. M. F. TULEY, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was an application made at the March term, 1871, of the Superior Court, by the collector of Chicago, for judgment upon a special assessment warrant to make up what the city failed to collect of an original assessment for paving, etc., North Dearborn Street, in Chicago.

This case is distinguishable from that of *Workman et al. v. City of Chicago* and *Union Building Association v. Same*, 61 Ill. 463, 489. In both of those cases all of the steps in the original proceeding, including the ordinance, were illegal and void; in this case we discover no grounds for holding invalid the report of the commissioners and statement of estimate, or the ordinance ordering the improvement and specifying the amount of the total estimated expense to be assessed upon the real estate deemed specially benefited, and that chargeable upon the general fund. The assessment was held void for want of proper notice for confirmation. When the commissioners are acting within their jurisdiction in making their report and a statement of the estimated cost of the work, and the ordinance proper and valid—as in this case—we are not prepared to say that such report and ordinance may not be adopted in the new proceeding, by a proper reference, and such proceeding held to be made as nearly as may be in the manner prescribed for a first assessment.

But as the judgment must be reversed, on the ground that

Opinion of the Court. Syllabus.

the collector had no authority to apply for it, we will forbear any discussion of the other points, because a different case may be presented at the hearing below as to the basis upon which this new assessment was made.

Judgment reversed and cause remanded.

*Judgment reversed.**

SHERIDAN POOLE *et al.*

v.

A. D. FISHER *et al.*

1. PARTNERSHIP—*as to third parties.* Where a person holds himself out as a partner to a party giving credit to the supposed firm, and by his conduct or declarations induces such person to give credit in the honest belief that he is a partner, he will be held liable as a partner.

APPEAL from the the Superior Court of Cook County ; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs. BLANCHARD & MILLER, for the appellants.

Mr. JAMES L. STARK, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This suit was brought against appellees, as partners, for goods sold and delivered.

* WALKER v. CITY OF CHICAGO.

Per CURIAM : This case is the same as that of *Burton v. City of Chicago*, and is disposed of in the same manner.

The judgment of the court below is reversed and the cause remanded.

Opinion of the Court.

They denied the partnership by proper pleas, verified by affidavit.

The judgment was rendered against Fisher for the debt, and in favor of Miller for costs.

The claim is not disputed; and the only question is, was Miller liable, as partner, for the debt incurred?

Fisher—a man without means or credit—commenced business in Chicago, and purchased goods of appellants, merchants in New York. The firm name was A. D. Fisher & Co.

The reporter of the mercantile agency in Chicago had an interview with Miller as to the parties who comprised the firm of Fisher & Co. Miller informed him that his father and himself were general partners of Fisher. Upon this information a report was sent to New York that the firm was responsible, so long as Miller & Son were connected with it.

Poole testified that Fisher said to him, when he purchased goods, that Miller was his partner, and the monied man of the firm; that afterward he saw Miller in the store in Chicago; was introduced to him as the partner of Fisher; conversed with him as partner; supposed him to be so; sold the goods under that belief; and met Miller at the Sherman House afterward; and he assured the witness that the claim would be paid.

McKean testified that both Fisher and Miller told him, that Miller was one of the firm; that he was introduced to Miller as the partner of Fisher; and the former admitted that he was a full partner.

Fisk testified that he first met Miller and Fisher in the fall of 1867; that Fisher spoke of Miller as his particular friend and partner; that Miller remarked that he took no active part in the business, but allowed Fisher to manage it; that afterward Miller spoke to him about a bill due by the firm, and said it must be paid.

Kelley, a clerk for the firm, testified he had a conversation with Miller, before the store was opened, and he said if the business proved successful, "we will go in on a large scale;" that he would be satisfied if the store paid his spending money; that

Opinion of the Court.

on one occasion Miller said to him, "do the best you can for us, and we will do well by you;" that he made inquiries about the business; and that he frequently heard Fisher introduce Miller as his partner, without any denial on the part of Miller.

This proof, if it does not show an actual partnership between the parties, is pretty conclusive that one existed as to third persons.

The testimony in defense is very slight.

Fisher made a positive denial of the partnership, and of all his acts and language indicating this relation. He is, however, so flatly contradicted by so many persons, that we can not attach much weight to his evidence.

Miller denied the partnership in fact; but he does not negative the numerous acts and remarks proved which necessarily induced third parties to believe that he was a partner. His reply generally was, "I don't remember." This was manifest evasion; for it would be passing strange if he could not recollect the interviews with Poole, and McKean and Fisk.

The testimony of the father has no weight in the scale. He said that his son was not a partner. How could he know the exact relation between the parties? He said, however, that he loaned \$10,000 to Fisher, and that his son and Fisher spoke to him about furnishing the money.

No reason is assigned for this generosity on the part of the father; no guide afforded to explain this exceeding interest on the part of the son.

We shall not inquire whether there was an actual partnership or not.

The acts and language of Miller most clearly induced appellants to give credit to the firm. The credit was given upon his responsibility. These creditors evidently believed him to be a partner, and acted upon such belief. The belief was honest, and fully justified by the conduct of Miller.

The law will therefore hold him liable, upon principles of general policy, and for the prevention of frauds upon creditors. The conduct, as well as representations, of Miller to one of

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appellants, are sufficient to charge him as partner. He held himself out as such, and can not escape the consequences. Story on Part. Sec. 64; *Fisher v. Bowles*, 20 Ill. 396; *Nichoff v. Dudley*, 40 Ill. 406.

The testimony is so overwhelming in favor of appellants, that we are constrained to reverse the judgment and remand the cause.

Judgment reversed.

SIDNEY T. WEBSTER

v.

CHARLES J. VOGEL *et al.*

1. **RELEASE OF DAMAGES**—*not implied by new contract with another person.* The defendant, by a verbal contract, chartered a vessel to plaintiffs for the season, guaranteeing that her boiler was in good condition, and delivered possession. On inspection the boiler was found to be in an unsound condition and needing extensive repairs. Defendant's agent directed plaintiff to make the necessary repairs, telling them it would be all right. After the repairs were made, involving a considerable expense and damage for wages paid employes who were idle during the repairing, the plaintiffs applied for a written charter-party, and were informed by defendant that he was not the owner of the vessel. While the repairs were being made defendant chartered the vessel for the season to a railroad company. The owner refused to charter her to plaintiffs, unless they would accept the charter which defendant had made to the railroad company and perform defendant's part of that agreement. The plaintiffs then took such charter, agreeing to perform defendant's contract with the railroad company, the owner agreeing to allow them one-half of the cost of the repairs: *Held*, that the new contract with the owner did not cancel the defendant's verbal undertaking and release him from liability for damages, except to the extent of the cost of repairs agreed to be paid by the owner.

2. **CONTRACT**—*implied abrogation or release.* It seems when a party has become liable by the violation or breach of a contract made by him in respect to the use of property of which he is not the owner, and the injured party then procures a similar contract from the rightful owner, and in it assumes some of the undertakings of the wrong-doer to still another party, that this will not, by implication, have the effect to dissolve the first contract and release the party making it from his liability for damages.

Opinion of the Court.

APPEAL from the Superior Court of Chicago; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs. RAE & MITCHELL, for the appellant.

Messrs. MILLER, FROST & LEWIS, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought by Vogel & Crandall, the appellees, against Webster, the appellant, to recover damages growing out of a verbal charter-party between the parties.

On the trial the evidence on the part of the plaintiffs tended to show a contract with Webster for the charter of the propeller "Equator" for the season of 1869, made on the fifteenth day of May, 1869; that Webster guaranteed the vessel to be of a certain capacity, and that her boiler was in good condition, and thereupon delivered to them possession of the vessel; that they went forward to get her ready for sailing, making such slight repairs as the contract contemplated, and called upon the inspector for a certificate of seaworthiness, who, after an examination, reported the boiler in an unsound condition and as needing extensive repairs; that they then informed Webster's agent of this, who told them to go on and do what was necessary to put the boiler in good condition, and that it would be all right; that they then repaired the boiler at an expense of \$2,523.18, aside from the wages paid their own men while the repairs were being made, \$600.13 in addition, finishing such repairs about the 14th of June; that they then applied to Webster for a written charter-party, in accordance with the terms of their agreement with him, and were then, for the first time, told that Webster was not the owner of the propeller, but that she belonged to one E. A. Buck, of Buffalo, and that before they could have the use of her they must make a contract with him. That they also learned, that on the tenth day of June, while they were still engaged in repairing her boilers, Webster had, without con-

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sulting them, chartered the propeller, for the season, to the Western Union Railroad Company, and that the agents of Buck refused to let them have any charter from him unless they would accept the charter which Webster had made to the Western Union Railroad Company and perform Webster's part of that contract; that they then took from E. A. Buck a written charter-party of the vessel for the season and executed a writing, which is termed a release by the appellant, whereby they agreed, in the stead of Webster, to perform the covenants and conditions in his charter-party to the railroad company.

There was a conflict between the testimony of defendants' and that of the plaintiff's witnesses, as to the terms of the contract between Webster and Vogel & Crandall, but the jury, to whom it was fairly submitted, on both sides, seem to have given credit to the latter rather than the former, and the court, in deciding the question for a new trial, found no reason for disturbing their verdict in this respect, nor do we, after an examination of the evidence.

The main point raised by the appellant as a ground for reversing the judgment of the court below, is, that the written charter-party with Buck of the 17th of June, together with the writing executed by the appellees, called a release, was, by the agreement of all the parties, substituted in the place of the verbal contract between Webster and the appellees of the 15th of May, and had the effect of dissolving that contract, and releasing Webster from the liability he was under to the plaintiffs, by reason of the breach of it.

In this written charter-party between Buck and the appellees nothing whatever is said about their previous agreement with Webster. Nor does it, in terms or by implication, release Webster from the payment of the damages appellees had sustained by reason of his breach of that agreement.

According to the plaintiffs' testimony they had sustained large damages by reason of the breach of Webster's agreement. Buck was the mortgagee of the vessel, not liable for them, and as Webster was not able to carry out his contract, the taking

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of the written charter-party from Buck, who alone could give a valid one, although for the most part the same as the prior contract with Webster, and containing a stipulation that Buck should pay half the cost of repairing the boiler, should not be held impliedly to release their claim for damages as against Webster, further, at least, than to the extent of what Buck agreed to pay.

The writing executed by the appellees, at the same time, was no more than to take the place of Webster in his contract with the Western Union Railroad Company. It contains what purports to be a release of Webster by the railroad company from his contract with it, and was evidently designed to be executed by the railroad company, and had it been, would have been a release of Webster from his contract with that company. It does not import to release him from any liability to the appellees under their contract with him of May 15th. There is nothing in the evidence showing any express agreement on the part of appellees to release Webster from the contract of the 15th of May, or the damages they had sustained by reason of his violation of that contract.

There was evidence on the part of the defendant of what the plaintiffs did and said which would go to show that the written charter-party was the final arrangement and settlement of all questions arising up to the time of executing the papers; but here, too, there was contradictory testimony on the part of the plaintiffs, and we think it should rest as settled by the jury. Their finding is sustained by the evidence, and no sufficient reason appears for disturbing it.

The judgment of the court below must be affirmed.

Judgment affirmed.

THE CATHOLIC BISHOP OF CHICAGO

v.

AUGUST BAUER.

62	188
138	74
140	522
62	188
82a	309
62	188
e192	1845
62	188
209	527
62	188
218	1537

1. **PLEADING**—*when plaintiff may declare generally—contract.* While it is true that there is no liability by implication of law upon an express contract, executory in its provisions, yet where there has been full performance, and nothing remains to be done but the payment of the money; or where there has been only part performance, and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had for the contract price of the service performed, under an *indebitatus assumpsit*.

2. **LIMITATION**—*from what time statute begins to run.* In a suit by a plaintiff to recover for services rendered as an architect, in which the statute of limitation was pleaded, it appeared that the plans were completed more than five years before suit was brought, but that he continued to act as architect, superintending the work on a church until within five years of bringing the suit, when he was discharged: *Held*, that the statute began to run only from the time of his discharge.

APPEAL from the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Messrs. MOORE & CAULFIELD, for the appellant.

Messrs. ROSENTHAL & PENCE, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was an action of assumpsit for work and labor.

It is insisted that there can be no recovery, under the common counts, as there was an express contract, and stipulated price, for the work performed.

There is no liability, by implication of law, upon an express contract, executory in its provisions. But when there has been full performance, and nothing remains to be done but the payment of the money; or where there has been only part performance, and the remainder has been waived or prevented, and the work performed has been accepted, then, in either case,

Opinion of the Court. Syllabus.

recovery may be had for the contract price of the service performed, under an *indebitatus assumpsit*.

In the case at bar, appellee had rendered all the service for which he contracted, except to superintend the completion of St. Peter's Church. He was prevented from doing this, and was virtually discharged by the employment of another architect, who had the use and benefit of his complete plans.

The statute of limitations is next relied upon in bar of the action. The plans for the inside finish of St. Peter's Church were ordered in 1865, and were completed by appellee. They were obtained from him by Father Fisher and the building committee in 1866. Until that time appellee was the architect of the church; and the statute had not run when the suit was commenced, in July, 1870.

It is also contended that the judgment is not warranted by the evidence. We have carefully reviewed the evidence, and do not think that there is any ground to disturb the finding of the court. This judgment is affirmed.

Judgment affirmed.

CATHARINE FREEMAN *et al.*

v.

JAMES FREEMAN.

1. WITNESS—*competency*. On the trial of a claim against the administrator of an estate, the husband of an heir-at-law of the deceased, as well as the wife, is a competent witness when called by the administrator to prove conversations and transactions between the claimant and the intestate which are relevant to the issue.

2. When a witness, in behalf of the representatives of a deceased party, is allowed to testify to conversations and transactions between the deceased and one prosecuting a claim against the estate, the claimant also will be allowed to testify in respect to the same conversations or transactions.

APPEAL from the Circuit Court of Kane County; the Hon. SILVANUS WILCOX, Judge, presiding.

62	169
34a	633

Opinion of the Court.

Messrs. BOTSFORD, BARRY & HEALY, for the appellants.

Mr. J. W. RANSTEAD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a claim filed in the county court of Kane County against the estate of Patrick Freeman, deceased, by the appellee, his son, for services rendered by the latter to the intestate, as a laborer on his farm since appellee attained his majority.

The claimant appealed from the decision of the county court to the circuit court, where a trial was had, which resulted in a verdict and judgment in his favor.

On the trial below, the defendants introduced John Mann as a witness, and offered to prove by him certain conversations and transactions between the claimant and his father, the intestate, which would have been material evidence in the case, but the court rejected the evidence, on the ground that the wife of the witness was the daughter of the intestate.

It is claimed that the witness was interested in the event of the suit, his wife being an heir and distributee, and being offered to prove facts occurring before the death of Patrick Freeman, he was an incompetent witness under the second section of the Act of February 19, 1867 (Gross' St. 286), abolishing the disqualification of a witness by reason of interest, which section provides that, "No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends, as the trustee or conservator of any idiot, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person," etc. But this is not a case which comes within that section. The case there provided for is where the adverse party sues or defends as administrator, etc.; but here, the adverse party, against whom the witness is called, sues in no representative capacity, but in his own right, and the witness was called for, not against, a party defending in the capacity

Opinion of the Court. Syllabus.

of administrator. The objection to the witness on the score of interest was removed by the first section of the act. Had the witness testified to any conversation or transaction with the claimant, the appellee, then, under the second excepted case under section two, the appellee would have been permitted also to testify to the same conversation or transaction.

It is further urged that the wife of the witness having a direct interest in the event of the suit, was incompetent herself, and the husband was not admissible as a witness under the familiar rule, that where the husband or wife is not a party to the record, but yet has an interest directly involved in the suit, and is therefore incompetent to testify, the other is also incompetent. But, as above shown, the wife herself, of the witness, would have been competent to testify; and we have held the general rule to be, that a wife can be a witness in all cases in which her husband could be a witness. *Ill. Cent. R. R. Co. v. Taylor*, 24 Ill. 323, and so, *vice versa*. We think there was error in the rejection of this testimony, for which the judgment must be reversed, and the cause remanded.

Judgment reversed.

CALVIN W. WEST

v.

WILLIAM FREDERICK.

1. **FORCIBLE DETAINER**—*vendor and vendee*. When a party borrows money and conveys land to secure its repayment with interest, and takes back a contract for the re-conveyance of the land upon payment, the relation of vendor and vendee will not exist between them, and the party making the loan can not maintain forcible detainer to recover possession upon default of payment by the party in possession. Such a case is not within the statute of 1861.

APPEAL from the Circuit Court of De Kalb County; the Hon. THEODORE D. MURPHY, Judge, presiding.

62	191
102	256
62	191
106a	208

Opinion of the Court.

Mr. CHARLES KELLUM, for the appellant.

Mr. B. F. PARKS, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

The appellee, Frederick, who was plaintiff below, loaned a sum of money to the appellant, West, and instead of a mortgage in form, took an absolute deed of the farm occupied by West, and gave him back a contract to re-convey upon the payment of the sum loaned, within one year. The money not being paid at maturity, Frederick brought this action of forcible detainer. Will the action lie?

It is contended by counsel for appellee that this case falls under the statute of 1861, Gross 301, which extends this action to "all cases between vendor and vendee, where the latter has obtained possession of the land under a contract by parol, or in writing, and before obtaining a deed of conveyance of the same, fails or refuses to comply with such contract to purchase."

This position is untenable. These parties are not vendor and vendee, and the defendant has not obtained possession of the land under a contract with the plaintiff. In two particulars the case is beyond the reach of the statute. It is stated by the plaintiff himself, in his testimony, that these instruments were executed merely as security for the loan of money. But even if the proof on this point were less conclusive, the fact that the defendant did not derive his possession from the plaintiff, would, of itself, be fatal to this action.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Opinion of the Court.

JAMES MIX

v.

DAVID OSBY.

62	193
34a	108
62	193
108	401
62	193
179	631

1. EVIDENCE—*agent's statements.* The statements of an agent made at the time of hiring a party to labor for his principal in reference to his employment, is not hearsay, but pertinent and legitimate evidence against the principal in a suit against him by the laborer to recover wages.

2. SAME—*order of proofs.* Under our practice a party has the right to introduce his evidence in the order he may prefer, provided he will connect it, and thus render it material to the issue. Thus, he may first show the acts and statements of one claiming to be an agent, to bind the principal, if he will follow it with proof of the agency, and show that the agent's acts were within the scope of his authority.

3. INSTRUCTION—in relation to single facts. The practice of selecting an isolated portion of the evidence and basing an instruction on it, should not be encouraged. But this court will not reverse for that reason alone, unless it can see that it probably misled the jury.

4. AGENCY—*proof of agent's authority.* Where the plaintiff was employed to labor for the defendant by one claiming to act as defendant's agent, the fact that defendant, when called on for pay, was informed by the plaintiff that the agent claimed to be such, and failed to deny the agency, or the agent's authority to employ plaintiff, is competent evidence in a suit by the plaintiff against the defendant.

APPEAL from the Circuit Court of Kankakee County ; the
HON. CHARLES H. WOOD, Judge, presiding.

Mr. THOS. P. BONFELD, for the appellant.

Mr. C. R. STARR, for the appellee.

M. JUSTICE WALKER delivered the opinion of the Court :

This was an action of assumpsit, brought by appellee in the Kankakee circuit court against appellant, to recover for work and labor. The declaration contained the usual common counts, to which was filed the plea of the general issue. A trial was had by the court and jury, when a verdict was ren-

Opinion of the Court.

dered for plaintiff for \$270. A motion for a new trial was overruled by the court, and judgment entered on the verdict; and defendant brings the case to this court on appeal.

The first objection urged for a reversal is, that the court erred in permitting what Stabler said to appellee, when he was employed, to go to the jury, before Stabler's agency was proved. Under the practice, a party has the right to introduce his evidence in the order he may prefer, provided he shall connect it, and thus render it material to the issue. This was not hearsay evidence, but it was the declarations of a person who claimed to be the agent of appellant. If he was his agent, then what he said whilst hiring appellee in reference to his employment was pertinent and legitimate evidence. Having proved what Stabler did and said, claiming to be such agent, it then devolved upon appellee to prove the existence of an agency, and that the employment was within its scope. On that question there was a contrariety in the evidence, and it was fairly left to the jury, and they have found there was an agency. When the contract and the evidence of appellee and Griffin are considered, we are not prepared to hold that it does not overcome the testimony of appellant. It was a question of evidence, the determination of which belonged to the jury; and their finding will not be disturbed, as it is not manifestly against the testimony.

Whilst we have frequently said that the practice of selecting an isolated portion of the evidence, and basing an instruction on it should not be encouraged, we have not said that we will reverse for that reason, unless we can see that it probably misled the jury. The instruction based upon appellant's failure to deny that Stabler had authority to employ appellee, when he asked for his pay, and informed appellant that Stabler claimed to be his agent when the employment took place, is objected to by appellant. This was, undoubtedly, evidence tending to prove the issue; we do not see that the instruction could have misled the jury, as it only informed them that they might consider it in reference to whether appellant knew of the contract made by Stabler with appellee.

Opinion of the Court. Syllabus.

When considered altogether, we think the evidence sustains the verdict. It is not manifestly against its weight. It was satisfactory to the circuit judge, who overruled the motion for a new trial, and it will not be disturbed. The judgment of the court below is affirmed.

Judgment affirmed.

THOMAS NEWLAN

v.

LOMBARD UNIVERSITY.

62 195
67a 160

1. ACTION—*change of name of plaintiff*. Where a promissory note was given to the Illinois Liberal Institute, whose name was subsequently changed, by an act of the legislature of this State, to that of Lombard University, the act authorizing the institution by its new name to sue for and collect all demands: *Held*, a suit on such note was properly brought in the new name.

2. NEW TRIAL—*finding of jury*. Where the whole case turns upon the evidence of a party to the suit, and that of an agent of the adverse party, and their testimony differs as to important facts, this court will not grant a new trial because the jury have given credit to the testimony of the agent.

3. ARBITRATION. In case of a submission to arbitration and award, if the parties refuse to abide the award, and make a new arrangement, this will be a waiver of the rights of the parties under the award.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

Mr. C. J. METZNER, for the appellant.

Messrs. CANFIELD & SHERWIN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on a promissory note executed by Thomas Newlan to the Illinois Liberal Institute, for a scholarship therein. The name of this institution was subsequently changed, by an act of the general assembly, to that of Lombard

Opinion of the Court. Syllabus.

University, and to it was transferred all the rights and obligations at that time pertaining to the Illinois Liberal Institute; and was empowered to sue for and collect all demands then held by the institution against third parties.

The demand in suit was one of that description, and no point of law is raised in the case calling for a decision by this court. The whole case turns upon the testimony of appellant, and C. P. West, the financial agent of the plaintiff. They differ as to some important facts; and as the jury have given credit to West, and perceiving nothing in the record to question the propriety of their finding, we can not interfere to disturb the verdict and judgment.

It is claimed by appellant there was a submission of the matter in difference to arbitrators, and that the note was merged in the award. There is but slight evidence of any submission, and if there was, it was waived by the subsequent arrangement to which West testified.

There being no error in the record, the judgment is affirmed.

Judgment affirmed.

CHRISTIAN TRISH *et al.*

v.

LOUISA NEWELL *et al.*

1. *SANITY—presumption.* Every man is presumed to be of sane mind until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental—caused by the violence of disease.

2. *SAME—distinction.* There is a distinction in the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. In the first case, proof is required to show a restoration; while in the other, the party alleging insanity must bring his proof of a continued derangement to that point of time which bears directly upon the subject in controversy.

62	196
121	384
62	196
124	526
62	196
126	582
127	534
62	196
130	479
62	196
145	274
146	346
62	196
148	46
62	196
151	119
62	196
161	122
62	196
176	454
62	196
183	274

Syllabus.

3. It is no more a presumption of law that a person rendered unconscious and incapable of mental action by a stroke of paralysis, will continue so for four months thereafter, than that he would if the same effect was produced by a wound on the head. Such a result may follow in either case, but the law will not so presume.

4. **TESTAMENTARY CAPACITY—burden of proof.** On a bill in chancery to contest a will after its admission to probate, the burden of proof is on those seeking to maintain the will, to show that at the time of its execution the testator was of sound mind and memory, to the extent of understanding what he was about.

5. **WILL—undue influence.** On the trial of an issue, whether an instrument purporting to be a will, was the will of the testator, the court, in substance, charged the jury that it should appear, from *all* the evidence, that it was not the result of undue influence exerted by others over a weak and enfeebled intellect, to the extent of substituting their will for his: *Held*, that the instruction was calculated to confuse and mislead the jury. It requires the fact to appear from *all* the evidence, without regard to the preponderance of proof on the point.

6. **TESTAMENTARY CAPACITY—rule or test of.** From the fact that a man might not be competent to make a will of one kind, and under some circumstances, owing to the nature and extent of the estate, the number of objects and the character of the disposition, when under other and different circumstances requiring less mental effort, he might be, the court appreciates the difficulty in attempting to lay down any definite rule in respect to the exact amount of mental capacity requisite to the making of a valid will.

7. **SAME.** The best form in which to submit the question to a jury, is, whether the mind and memory of the testator was sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will, judging his competency of mind by the nature of the act to be done, from a consideration of all the circumstances of the case.

8. To be of sound and disposing mind and memory, a person should be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection of the property he means to dispose of; of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should comprehend the provisions of his will in their legal form. It is sufficient if he understands the elements of which it is composed—the disposition of his property in its simple forms.

9. Upon the question of testamentary capacity, the court charged the jury that they must be satisfied, upon the evidence, that the testator “had sufficient strength of mind and memory to take into account and retain in his

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mind, without dictation from others, the nature and objects of his bounty, the nature and character of his property, and the manner in which he was disposing of it; the person who was the natural object of his bounty, and her claims upon him; the relation which he sustained toward them, who, by the will, were made the recipients of his bounty; and his mind should be sufficient to enable him to have a comprehension that he was disposing of his property by will, and to know how it was being disposed of by said will." *Held* that the charge was erroneous.

10. The court further instructed, "that in order to have sufficient capacity to make a valid will, the testator must have something more than mere passive memory; he must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and be able to form some rational judgment in regard to them:" *Held*, objectionable, as requiring a capacity not possessed by a great portion of mankind, even without the impairing effect of disease.

11. INSTRUCTIONS should not only be correct in their propositions of law, but should be expressed in clear and concise language, without the use of words meaningless, or tending unnecessarily to embarrass the opposite party.

WRIT OF ERROR to the Circuit Court of Kendall County;
the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. C. J. METZNER, for the plaintiffs in error.

Messrs. WHEATON, SMITH & MCDOLE, for the defendants
in error.

Mr. JUSTICE McALLISTER delivered the opinion of the
Court:

This was a bill in equity, brought under the statute of wills, by defendants in error, as husband and wife, the latter being the only heir-at-law of Joseph Wing, deceased, against plaintiffs in error, to set aside what purported to be the last will and testament of said Wing, which had been admitted to probate, on the ground of want of testamentary capacity in him, and for undue influence and fraud exercised and practiced by plaintiffs in error in obtaining its execution.

Answers and replications were filed and an issue made up to be tried at law, whether or not the instrument purporting to be the last will and testament of Joseph Wing, deceased, was his

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will. This issue was tried by a jury, and a verdict returned that said instrument was not the will of said Joseph Wing. A motion was made for a new trial, which was overruled by the court, to which exception was taken, and a decree was entered setting aside the will and probate thereof. The evidence, rulings of the court, and exceptions were preserved by bill of exceptions, and the defendants below brought the case to this court by writ of error.

Numerous errors have been assigned, many of which are baseless and untenable, but some of them present questions which are deemed worthy of serious consideration.

It appears that Wing, about the 10th day of July, 1866, being then about eighty years of age, was visited with a severe stroke of paralysis, which at the time rendered him quite, if not wholly unconscious ; but upon being bled he recovered his consciousness, and improved to the extent, as stated by his then attending physician, that he knew his acquaintances and what he wanted, but remained helpless, one side continuing paralyzed, and his powers of speech were irrevocably lost ; but as to the degree of capacity attained we desire to express no opinion of our own. He survived until May, 1868. On the 21st of November, 1866, something over four months after the attack, the will in question was executed. His condition, about the time of the attack, and its severity, were not much controverted, but it was maintained by the defendants below, who assumed the burden of proof in respect to his sanity, that, however violent the stroke might have been, still he soon recovered measurably from it, and was so far improved at the time of making the will that he then possessed full testamentary capacity. This was controverted by complainants below, who insisted that by the severity of the stroke of paralysis he became and continued, down to the time of making the will, so far deprived of mind and memory as to be incapable of making a valid will ; and, at all events, he was thereby reduced to such a weak condition of body and defect of intellect as to render him a mere passive instrument in the hands of those about him, and that, therefore, his feeble condition of body and mind, in con-

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nection with the other proof as to surrounding circumstances and dominion over him, on the part of some of the defendants below, furnished most essential and convincing proof that this particular will was made without the proper legal consent of the testator.

Such being the theory of the case by the respective parties, each party introduced a large mass of evidence in support of the grounds taken.

On behalf of the complainants, the court, by the third instruction, directed the jury as follows :

" If the jury believe, from the evidence, that, on the 10th day of July, 1866, the deceased, Joseph Wing, was, by a stroke of paralysis, rendered entirely unconscious, and of unsound mind and memory to the extent defined in other instructions, the law presumes such unsoundness of mind to continue until the contrary is proven; and the burden of proof is on those now seeking to establish this will, to show affirmatively, and to the satisfaction of the jury, that said Wing subsequently, and before said alleged will was made, became of sufficiently sound mind, and of a sufficiently rational and disposing mind at the time of the execution thereof, so that he could and did comprehend its motive and effect; and they must establish this by preponderance of proof, or the jury must find against the alleged will."

Exception was taken to this instruction by the defendants below, and the giving of it is assigned for error.

This instruction was wrong, and must have been very prejudicial to the opposite party. Greenleaf says, " Every man is presumed to be of sane mind until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, *unless the derangement was accidental—caused by the violence of disease.* 1 Greenlf. on Ev. § 42.

In *Hix v. Whittemore*, 4 Met. (Mass.) 545, a similar instruction was given. The court, Dewey, J, delivering the opinion, says :

" The force of presumption arises from our observation and

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experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of their faculties." Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as an unqualified maxim of the law, "Once insane presumed to be always insane;" but reference must be had to the peculiar circumstances connected with the insanity of an individual, in deciding upon its effects upon the burden of proof, or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former once established would require proof from the other party to show a restoration or recovery; and in the absence of such evidence insanity would be presumed to continue; but if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period. The learned judge cited the case of *Cartwright v. Cartwright*, 1 Phillim. 100, where the same distinction was taken; also 1 Williams on Executors 17, 18; Swinburne on Wills, Part 2, Sec. 3; 1 Collison on Lunacy, 55; Shelford on Lunacy 275; 1 Hale P. C., 30.

It is no more a presumption of law that a person rendered unconscious and incapable of mental action by stroke of paralysis will continue so for four months thereafter, than that he would so continue when the same effect was produced by a wound on the head. Such a result might follow in either case, but the law does not presume that it would in either.

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The instruction we have just been considering is so essentially erroneous, that, for giving it, we must reverse the decree. But we feel constrained to condemn others given on behalf of complainants, viz.: the first, fourth, and fifth. The first is as follows:

"The burden of proof is upon those seeking to establish that the paper introduced in evidence is the will of said Joseph Wing, deceased, to show that at the time of the alleged execution thereof the said Wing was of sound mind and memory, to the extent of understanding what he was about; and that the alleged will was the free and deliberate offspring of a sufficiently rational and disposing mind to comprehend the nature and effect of the will; and it should appear, from *all* the evidence, that it was not the result of undue influence exerted by others over a weak and enfeebled intellect to the extent of substituting their will for his; these are, however, proved till the contrary appears, if the facts are as mentioned in defendants' first and second instructions."

It is correct in reference to the rule announced respecting the burden of proof. But the expression that "it should appear, from *all* the evidence, that it was not the result of undue influence," etc., was calculated to confuse and mislead the jury. And the last clause, commencing with the words "these are," seems utterly meaningless. Instructions should not only be correct in their propositions of law, but should be expressed in clear and concise language, without the interjection of words having a tendency to unnecessarily embarrass or render impossible the maintenance of the case of the opposite party. If the defendants below were required, as this instruction, taken literally, declares, to make it appear from *all* their evidence that the will was not the result of undue influence, they would necessarily fail, no matter how good a case they had upon the preponderance of proof.

The fourth and fifth instructions are as follows:

"Upon the question of the mental capacity necessary to make a valid will, the jury are instructed that, in order to find the alleged instrument to be the will of the deceased, Joseph Wing

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they must be satisfied upon the evidence that the said Wing had sufficient strength of mind and memory to take into account and retain in his mind, without dictation from others, the nature and objects of his bounty, the nature and character of his property, and the manner in which he was disposing of it; the person who was the natural object of his bounty, and her claims upon him; the relation which he sustained toward them, who, by the will, were made the recipients of his bounty; and his mind should be sufficient to enable him to have a comprehension that he was disposing of his property by will, and to know how it was being disposed of by said will."

"Upon the question of testamentary capacity, the jury are further instructed that, in order to have sufficient capacity to make a valid will, the testator must have something more than mere passive memory, he must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and be able to form some rational judgment in regard to them."

The propositions embodied in these instructions are taken principally from an elementary treatise of a high character, and the last of the two is copied literally from the opinion of the court in *Converse v. Converse*, 21 Vermont, 168.

It is probable that no court has ever attempted to lay down any definite rule in respect to the exact amount of mental capacity requisite to the making of a valid will, without appreciating the difficulty of the undertaking; and we experience it in no slight degree. We are unwilling to adopt so low a standard as that approved in *Stewart v. Lispenard*, 26 Wend. 255, that wills of persons of the lowest degree of mental capacity are to be sustained if there is a glimmer of reason. Nor do we approve, as a rule, that embraced in the last instruction. As a passage in legal literature, it sounds well; and as an attempt to group the several elements of capacity, debated by the courts, into one compact sentence, commands admiration. But when closely analyzed, it requires and would convey to the

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minds of the jurors a degree of capacity which they themselves possessed, or which is possessed by the average of mankind in good health. If a man have a memory so active as to collect in his mind, without any prompting, all of the particulars or elements of such a business as making a will, and power to hold them in his mind long enough to perceive all their obvious relations to each other, and then be able to form a rational judgment in regard to them, he is a man of ordinary capacity and ability, at least; and a not inconsiderable portion of mankind, would, under this rule, be found incapable of making a will, even without the impairing effects of disease. A brief retrospect by any lawyer of experience will lead him to the conclusion that scarcely none of his clients for whom he has drawn wills, were even able to go through with it without much prompting as to particulars, especially where the estate was large, diversified as to kinds of property, and to be distributed among several legatees or devisees. It is true, as said by Justice Washington, in *Harrison v. Rowan*, 3 Wash. C. C. Rep. 585, "He must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection of the property he means to dispose of; of the persons who are the objects of this bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such mind and memory as will enable him to understand the elements of which it is composed—the disposition of his property in its simple forms."

In *Marsh v. Tyrrell*, 2 Flagg, 122, that eminent and experienced judge, Sir John Nicholl, said: "It is a great but not uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise; the

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competency of the mind must be judged of by the nature of the act to be done from a consideration of all the circumstances of the case."

The idea here intended to be conveyed by the learned judge is, that a man might not be competent to make a will of one kind and under some circumstances in relation to the estate, the number of objects, and the character of the disposition, when under other and different circumstances, requiring less mental effort, he might be. We know, practically, that it requires a less degree of capacity to thus dispose of a single farm and the usual personal property owned by a farmer, by a distribution among a few recipients, than of a large and diversified estate, among numerous recipients, with various gradations of their bounties. So that there can be no safer practical rule than that the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all of the circumstances of the case. Jarman in his treatise on Wills, vol. 1, p. 51, after referring to the leading cases upon this subject, comes to the conclusion that the question in its most simple and intelligible form should be stated thus: "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will." And we agree with the observation of the court in *McClintock v. Curd*, 32 Missouri, 419, that this is the best form in which the question can be submitted to a jury, with this addition, that in determining the question, the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case.

We have discussed this question without any reference to the agency of undue influence or fraud, which presents other considerations. The decree of the court below is reversed and the cause remanded.

Decree reversed.

Syllabus. Statement of the case.

ANDREW FORSYTHE

v.

SETH W. HARDIN.

1. *EJECTMENT—evidence of outstanding title.* The plaintiff in an action of ejectment deduced title through a sale under judgment and execution against a prior owner and sheriff's deed. The defendant offered in evidence a prior deed made by the same owner in trust for the benefit of creditors, which was recorded before the recovery of the judgment under which the lands were sold, to defeat a recovery by showing an outstanding title. This deed was held to be fraudulent on its face in imposing conditions and restrictions which were onerous and illegal: *Held*, that such deed being void could not be used to show an outstanding title.

2. *EVIDENCE—proof of execution—attesting witness.* The rule which requires that the attesting witness to a written instrument shall be called to prove its execution, if within the State, has no application to a case where both parties to the instrument are in court and waive their right to insist on producing such witness.

3. The reason for the rule requiring that the subscribing witness shall be called to prove the execution of a written contract, is to protect the interest of the party sought to be charged. Such party is a competent witness to prove its execution without producing the attesting witness. To deny the parties to such contract the right to admit its execution is entirely capitious.

APPEAL from the Circuit Court of Will County; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action of ejectment brought by Hardin, appellee, to recover certain land in Will County.

The appellee read in evidence the register's certificate, showing that, in May, 1836, one William B. Egan purchased of the United States the whole section of which the land in dispute formed a part; also a patent from the United States to Egan, dated October 1, 1839. It was also shown that, in July, 1837, one Hastings recovered judgment against Egan in the Municipal Court of Chicago, upon which execution, dated October 25, 1837, was issued, directed to the sheriff of Will County, and levied upon the land, and it was sold, and sheriff's deed was

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made to Bailey & Reynolds, from whom the plaintiff below deduced his title.

The defendant below (appellant) offered in evidence a deed made by Egan on the first day of July, 1837, to Breese in trust for the payment of his creditors. This deed imposed upon a class of creditors a condition that they should be excluded from the benefit of the assignment unless they should formally accept its provisions within thirty days after notice. The trustee was authorized to sell at private sale within two years, at his discretion; fix prices and terms; to sell or mortgage for the payment of taxes. The facts in relation to this deed appear more fully in *Hardin v. Osborne*, 60 Ill. 98.

The instructions given and refused, referred to in the opinion, relate to the effect of this fraudulent deed from Egan to Breese.

Messrs. SCAMMON, McCAGG & FULLER, for the appellant.

Mr. EDMUND S. HOLBROOK and Mr. G. D. A. PARKS, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The main error assigned by appellant is the exclusion of the deed from Egan to Breese as evidence of outstanding title. This has been determined against him upon the authority of *Hardin v. Osborne*, 60 Ill. 93.

The same case disposes of the errors assigned in giving and refusing instructions.

The cross errors are, by the same opinion, settled in favor of appellee, except the refusal of the court to permit the lease from Hardin to Hamilton to be used as evidence.

There was a subscribing witness to the lease resident in the State, and the court excluded it because he was not produced.

Both parties to the lease were present in court, and were offered to prove the execution, and stated that they did not desire the presence of the subscribing witness, and acknowledged the execution in open court.

The reasons given for the rule that a subscribing witness

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must be called, if within the jurisdiction of the court, do not apply to this case. Greenleaf says (Greenleaf Ev. 1, Sec. 569) the reason upon which the rule seems best founded, is that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. This is deduced from the case of *Call v. Dunning*, 4 East, 58.

Another reason assigned is, that the party to whose execution he is a witness is considered as invoking him as the person to prove what passed at the time of the attestation. *Cussons v. Skinner*, 11 M. & W. 168.

In *Hollenback v. Fleming*, 6 Hill 303, it is said that the subscribing witness must be called, because he may state the time of the execution, and other material facts which may not be within the knowledge of any other witness.

The reasons given for the rule seem to be for the benefit of the obligor, or, in this case, the covenantor. The lessor and lessee were both present in court, and were willing to waive any right as to the presence of the witness. Besides, the lessor, who was plaintiff in the suit of ejectment, was a competent witness, and he, together with the lessee, must have known every material fact relative to the execution of the lease. A denial to the parties to a contract, under the circumstances, of the right to admit its execution, would be entirely capitious.

The judgment is reversed upon the cross errors, and the costs are directed to be taxed against appellant, and the cause is remanded.

Judgment reversed.

WILLIAM SUTTON

v.

VIRGINIA F. JOHNSON.

62	209
129	529
62	209
198	413

1. **TRESPASS TO THE PERSON—evidence.** In an action by a female for an assault and battery and assault with intent to commit a rape, a witness for plaintiff testified that defendant said, "He and his wife hadn't got along first rate, and he had to be too intimate with the hired woman;" or, "was forced to be too intimate with the hired woman." It did not appear who this hired girl was, and the witness did not know who she was. The defendant moved to exclude this testimony for irrelevancy, which the court refused to do: *Held*, that the court erred in not excluding it, as it did not tend to prove the assault charged, and did tend to prejudice the defendant with the jury.

APPEAL from the Circuit Court of Peoria County; the Hon. S. D. PUTERBAUGH, Judge, presiding.

The verdict of the jury was for \$1,700, and plaintiff remitted \$700.

Mr. H. W. WELLS, for the appellant.

Mr. J. S. STARR, and Messrs. O'BRIEN & HARMON, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought to recover damages for an alleged assault and battery and an assault with intent to commit a rape.

Upon the trial, William H. Meeker, a witness on behalf of the plaintiff, testified that, in a conversation with Sutton in regard to himself and the plaintiff, Sutton said he and his wife hadn't got along first rate, and he had to be too intimate with the hired woman, or was forced to be too intimate with the hired woman. He did not mention who his hired girl was, nor did the witness know who had been his hired girl.

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The defendant moved to exclude this testimony from the jury, on the ground that it did not sustain nor tend to sustain the declaration, which motion the court overruled, and defendant excepted thereto.

This evidence did not tend to prove the assault and battery, or assault laid in the declaration, and did tend to prejudice the jury against the defendant.

There should not have been brought into the trial of the simple issue in this case any thing which might be regarded as slanderous matter, or other improper conduct of the defendant, to make against him, and, by its consideration, be likely to influence the verdict of the jury.

Judging from the amount of the verdict, and a view of the whole testimony taken together, the jury would seem to have been led to their verdict by the consideration of something else than the legitimate testimony in the case.

We think the court should have excluded the testimony as entirely irrelevant to the issue on trial.

For not doing so the judgment is reversed, and the cause remanded.

Judgment reversed.

62	210
28a	304
62	210
37a	182
37a	563
62	210
58a	578

EZEKIEL SMITH

v.

ARCHIBALD YOUNG *et al.*

1. ATTORNEY—*equitable lien—equity jurisdiction.* Where a bill in chancery showed that complainant made a contract with the defendants, who were non-residents, by which he undertook the collection of a debt secured on a tract of land, incurring all necessary expenses and costs, and assuming all risks, and for which, if successful, he was to receive one-fifth of the proceeds, whether land or money; that a suit in chancery was commenced by him and prosecuted to final decree, a sale of the land made, and certificate of purchase issued to one of defendants, and that they had refused to recognize the rights of complainant, with prayer for a decree for one-fifth of the land, if not redeemed, otherwise for one-fifth of the pro

Opinion of the Court.

ceeds: *Held*, on demurrer, that the complainant was entitled to the relief sought, being entitled to an equitable lien on the land under the contract.

APPEAL from the Circuit Court of LaSalle County; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. J. H. KNOWLTON, for the appellant.

Messrs. BLANCHARD & SILVER, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

The bill in this case, alleges that the complainant, Smith, made a contract with Young & Van Kleeck, resident in New York, by which he was to undertake the collection of a debt secured on a tract of land in LaSalle County, incurring all necessary expenses and costs himself, assuming all risks, and for his services to have one-fifth of the proceeds, whether land or money. The bill further shows the prosecution of a suit in chancery to a final decree, a sale of the land, a certificate of purchase issued to Young, and a refusal by Young & Van Kleeck to recognize the rights of complainant. The bill prays a decree for one-fifth of the proceeds if the land is redeemed, or a conveyance of an undivided fifth of the land if it is not redeemed.

On the allegations of the bill we think the complainant entitled to relief. Without considering whether he could maintain an action at law, and recover a judgment before the land is converted into money, it is sufficient to say that under his contract he has an equitable lien upon one-fifth of the land, which is in danger of being lost by the unjust course of the defendants. The case, as presented by the bill, is wholly unlike *Morgan v. Roberts*, 38 Ill. 45, cited by counsel for appellees. In that case one of the attorneys entirely abandoned the case he had undertaken, and his client was obliged to employ new counsel. Here the complainant did not abandon the cause,

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but merely employed an attorney resident in the county to assist him.

Decree reversed.

RICHARD BIRD *et al.*

v.

HUGH FORCEMAN *et al.*

1. **CONTRACT**—*representations inducing sale.* Where a party purchasing hogs for the market not being aware of the fact that the prices had advanced in Chicago, but relying upon a newspaper report, represented that hogs were on the decline in the market at Chicago, and, in fact communicated all the information within his knowledge on the subject, and thereby induced the owner of a lot of hogs to agree to sell and deliver them at a certain price per pound: *Held*, that the seller could not refuse to deliver, on the ground that the prices had advanced instead of declining.

2. **INSTRUCTION**—*assuming the existence of a contract.* In a suit to recover damages for the non-delivery of hogs under an alleged contract, the court instructed the jury as follows: "It is incumbent on the defendants, under the contract alleged in plaintiff's declaration, to show an offer to perform, or some excuse for non-performance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that plaintiffs were ready and willing to perform their part of the contract:" *Held*, not liable to the objection that it assumed the existence of the contract, and when taken in connection with the others given could not mislead the jury.

APPEAL from the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was a suit brought by appellees against appellants, to recover damages for the non-performance of a contract for the sale and delivery of forty-five fat hogs.

It appeared that appellees had offered seven cents per pound for the hogs, but that appellants asked more. One of appellees said, that the last Chicago *Times* he had seen, quoted hogs of that quality on the decline. Upon this, appellants agreed to sell and deliver at the price offered, according to the evi-

Statement of the case.

dence of appellees, appellants testifying that the sale was conditional, and dependent upon the fact that the price was on the decline in Chicago. It appeared from the *Chicago Times* of the previous day, that the price was on the decline. It also appeared, that in fact on the day of the purchase the price had advanced, but that appellees did not know it.

The court, for the plaintiffs, gave the following instructions:

1. "If the jury believe, from the evidence, that the defendants contracted with the plaintiffs, to deliver to plaintiffs a certain number of fat hogs at the time and in the manner stated in plaintiffs' declaration; and also that plaintiffs were ready and willing to receive and pay for the hogs at the time and place, and at the price agreed upon, as plaintiffs have in their declaration alleged, the defendants were bound to offer to deliver the hogs in accordance with the terms of the contract, or pay the damages occasioned by their non-performance or failure to deliver the said hogs.

2. "It is incumbent on the defendants under the contract alleged in plaintiff's declaration to show an offer to perform, or some sufficient excuse for non-performance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that the plaintiffs were ready and willing to perform their part of the contract.

3. "The jury are instructed that the measure of damages in this case is the difference between the contract price and what the hogs were actually worth in the market at Prairie City, where they were to be delivered."

At the instance of appellants the court instructed the jury:

1. "That if they believe, from the evidence, that plaintiff Cates, went to the residence of Birds to buy their hogs, and then proposed to give said Birds seven cents per pound for said hogs, telling them that hogs were on the decline; and defendants, or one of them, told the plaintiff Cates, that if hogs were on the decline at that time they, the plaintiffs, could have them at seven cents per pound, and that they, the defendants, would deliver them at Prairie City the next Monday; and, if the jury further believe, from the evidence, that hogs were not, at that

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time, on the decline, but were really advancing in price, then the defendants were under no obligations to deliver the said hogs to the plaintiffs on such contract, and the verdict should be for defendants.

2. "The court instructs the jury that plaintiffs, in this case, can only be entitled to recover by proving the contract that they have set out in their declaration; that it devolves upon them to make out their case; that they must do so by a preponderance of testimony; and, if the jury believe, from the evidence, that the defendants agreed to sell their hogs to plaintiffs for seven cents a pound on condition that the price of hogs was on the decline on the 17th day of September, being the date of the contract, and that such was the contract between them, then the jury will find for the defendants, if they further believe, from the evidence, that hogs were not on the decline, but were, in fact, advancing in price; and it makes no difference, under such a state of facts, if, from the evidence, the jury believe them to have existed, whether the plaintiffs knew of the decline in the price of hogs or not."

The jury returned a verdict for appellees and assessed their damages at \$192.37. Motion for new trial overruled and judgment on the verdict. Exception taken and an appeal allowed.

Messrs. STEWART & PHELPS, for the appellants.

Messrs. BAILEY & COLE, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

There is no error in this record to justify a reversal of the judgment.

After a careful reading we can not say that the verdict is against the weight of the evidence.

The plaintiffs below proved that they purchased the hogs at seven cents per pound, and that they remarked that the price of hogs was on the decline, according to the report of the market in the *Chicago Times*. That paper, dated on the day before the

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purchase, was introduced, and from its market report it appeared that the prices of hogs were on the decline.

This evidence was not satisfactorily negatived on the part of the defendants. They admitted, upon their examination, that the plaintiffs only offered seven cents per pound; but insisted that they sold upon the condition that the prices were not on the decline. dec

It was also in proof that, though the prices had actually advanced, the party purchasing was not aware of the fact at the time of the bargain; that he relied upon the newspaper report, and communicated all the information within his knowledge.

The defendants were witnesses, and did not deny that the purchaser referred to the *Chicago Times* as his authority as to the value.

The important inquiry was as to the character of the bargain.

In the varying condition of the market it is most unreasonable to assume that a trader would buy upon the condition supposed. His purchases would be wholly uncertain, and he would have no guide as to future contracts.

The jury have determined as to the truth of the respective statements, and we are not disposed to disturb their finding.

Error is assigned upon the second instruction given for appellees. It is as follows: "It is incumbent on the defendants, under the contract alleged in plaintiffs' declaration, to show an offer to perform, or some excuse for non-performance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that plaintiffs were ready and willing to perform their part of the contract."

This instruction is not liable to the objection that it assumes the existence of the contract, and in connection with other instructions it could not mislead the jury.

The instruction immediately preceding it in the series informed the jury that they must believe, from the evidence, that the parties contracted as set out in the declaration. It would then follow, as a matter of law, that the defendants must excuse their non-performance.

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On behalf of appellants the court instructed the jury that appellees could not recover unless they had proved the contract, as alleged in their declaration, by a preponderance of evidence.

It is most improbable that the jury were confused by the instructions.

The judgment is affirmed.

Judgment affirmed.

DANIEL N. BASH *et al.*

v.

THOMAS A. HILL *et al.*

1. **CONTRACT—services to effect sale.** Where the plaintiffs are employed by defendants to assist in making a trade in real estate with a promise of a certain compensation in case the same is effected, and do assist in bringing about a trade, they will be entitled to recover the sum agreed to be paid, even though the defendants had changed their proposition, with a view to dispense with plaintiffs' services, when the plaintiffs received no notice of such fact.

2. When a party engages the services of another to assist him in making an exchange of property, if he desires to dispense with such services, he should give the other party notice. If he does not, and the service is rendered, he will be required to pay for the same.

APPEAL from the Circuit Court of Cook County; the Hon. HENRY BOOTH, Judge, presiding.

The facts are substantially stated in the opinion. The court, on its own motion, gave the following instruction:

"If the jury find from the evidence that the defendants agreed with the plaintiffs, that, in case the plaintiffs would assist the defendants in making the trade in real estate set forth in the declaration; and that in case the said trade should be made, the defendants would pay the plaintiffs the sum of

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\$1,200; and if the jury further find from the evidence, that the plaintiffs, relying upon such agreement of the defendants, did assist the defendants in making such trade, and such trade was in fact made, then the plaintiffs are entitled to recover."

Messrs. SPAFFORD, McDAID & WILSON, for the appellants.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This suit was brought by appellees, in the circuit court of Cook County, against appellants, to recover commissions as real estate agents, on property claimed to have been sold, and in the sale of which appellees aided appellants, all parties being real estate brokers. The declaration contains a special count, only, in which it is averred that appellants employed appellees to assist them in effecting a sale of real estate near the city, and for which they agreed to pay appellees \$1,200 for their services in consummating the sale; that the sale was made to persons named.

The evidence, on the part of appellees, sustains the averments in the declaration. The contract was sworn to, as set forth in the declaration, by both appellees and one Hawhe. One of appellants swore that the offer was to give appellees \$1,000 to assist them in effecting a different sale; or rather, the same property, but on different and better terms. And Crawford, one of the purchasers, testifies that several propositions were made in reference to the exchange of property, which was accomplished. An exchange or sale of the property was made, and appellees swear they aided its completion, and that if any change in the terms occurred, they were not notified of it, or in anywise apprised that appellants had so changed propositions as to dispense with, or intended to dispense with their services. They deny that when they were employed they were informed of the propositions then pending between the parties.

Appellants, having engaged the services of appellees, should, if they desired to dispense with their services, have given them notice. On the contrary, they seem to have omit-

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ted to do so, thus availing themselves of their services, and when the trade is made they refuse to compensate them.

We fail to see that there was a variance between the declaration and proof. Appellees' evidence sustained the agreement set out in the declaration, while that of appellants is variant.

The jury, however, believed appellees' to be true, and were fully warranted in acting upon it. The evidence would have warranted a verdict for the amount claimed in the declaration, but appellants have no right to complain, as this verdict operates in their favor. We perceive no error in the instruction given by the court on its own motion. It states the law of the case correctly, and could not have misled the jury. Perceiving no error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

LEROY D. DEWEY *et al.*

v.

JONAS ECKERT.

1. CHANCERY—*jurisdiction*. Where one partner borrowed money for his individual use, for which he gave his note, with the other partner as security, and the latter, after a dissolution of the partnership, was compelled to pay the same, after which he filed a bill in equity, to have the sum so paid set off upon a note given by him to his co-partner on the dissolution: *Held*, that the complainant had an adequate remedy at law by an action of assumpsit.

2. CREDITOR'S BILL—*no effort to collect at law*. A party having paid a debt as security for another, filed his bill in equity, alleging that his debtor had left the State, taking with him all his effects; that he had sold all his real estate and conveyed certain city lots to his son, who had conveyed to his mother, and that these conveyances were made without consideration, and for the purpose of defrauding complainant and other creditors. The court found the amount of indebtedness, and decreed it a lien upon the lots, and required the son and mother to convey to the debtor, and directed sale of the lots for the payment of the debt and costs: *Held*, that complainant should first have reduced his demand to judgment before

62	218
25a	153
62	218
139	561
145	232
41a	416
62	218
162	309
62	218
66a	663

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coming into equity to question the disposition of the debtor's property, and subject it to the payment of his debt.

3. Under the circumstances above stated, the complainant might have proceeded by attachment against the property alleged to have been fraudulently conveyed, obtained his judgment, and then gone into equity to remove the conveyances out of the way of his execution, or to subject the property to sale in satisfaction of his judgment.

4. A court of equity has no power to create a lien beyond the general one which follows from a decree for the payment of money. It can only recognize and enforce a lien which is created by the acts of the parties.

WRIT OF ERROR to the County Court of La Salle County ;
the Hon. P. K. LELAND, Judge, presiding.

This was a bill in chancery by Jonas Eckert against Leroy D. Dewey, Eugene L. Dewey, and Sibbil J. Dewey. It alleged a prior partnership between Eckert and Leroy D. Dewey, in the milling and grain business ; its dissolution and the sale of Dewey's interest to Eckert for \$9,000, and the payment of the same, except a balance on the last note of \$4,000, not then due ; that during the partnership complainant executed a note with Dewey, for \$619.50, for money borrowed by Dewey for his individual use ; that complainant paid said note, amounting to \$700, and some partnership debts ; that Dewey had removed from this State with his family, taking all his effects with him ; that he had conveyed certain lots in Mendota to his son, Eugene L., and that the latter had conveyed them to his mother, Sibbil J. Dewey ; that these conveyances were made without consideration, and for the fraudulent purpose of cheating and delaying complainant and other creditors. The bill prayed that all claims due complainant be set off against the \$4,000 note, and if the same be sold before injunction served, that complainant have recourse upon the real estate so fraudulently conveyed.

The court below found that there was due to complainant \$735.58, and decreed the same a lien upon the said real estate, and any other that Dewey might own in the county, and required the same, with costs, to be paid in thirty days. It also

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provided that if default was made in payment, the master in chancery should convey said real estate to Leroy D. Dewey, and thus annul the fraudulent conveyance, and that said master should sell the same in satisfaction of the decree.

Mr. T. LYLE DICKEY and Mr. H. K. BOYLE, for the plaintiffs in error.

Mr. G. S. ELDRIDGE, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

The causes of action set forth in the bill were mere legal demands, for the collection of which there was an adequate remedy at law, by an action of assumpsit, as for money paid by Eckert on the account of Dewey at his request.

Admitting that the court below had jurisdiction to adjudge the indebtedness, as no objection to it was taken there, or that the court had jurisdiction to enforce a set-off of the claim upon the outstanding note against Eckert, in favor of Dewey, yet that would not justify the decree in respect to the lands described in the bill.

Eckert should first have reduced his demand to a judgment before he could come into a court of equity and question the disposition of the debtor's property, and subject it to the satisfaction of his debt. Unless the creditor has a certain claim upon the property of the debtor, he has no concern with his frauds. Under the circumstances of this case, Eckert might have proceeded by attachment against the property alleged to have been fraudulently conveyed, obtained his judgment, and then gone into equity to remove the conveyance out of the way of his execution, or to subject the property to sale in satisfaction of his judgment. *Greenway et al. v. Thomas et al.* 14 Ill. 271; *Getsler v. Saroni.* 18 Ill. 511; *Wiggins v. Armstrong* 2 Johns. Ch. R. 144; *McConnell v. Dickson,* 43 Ill. 99.

The payments of money by Eckert, alleged in the bill, gave him an action for money paid, but created no lien or trust that

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authorized a court of equity to render the real estate liable on account thereof, and the court had no power to create a lien beyond the general one which follows from a decree for the payment of money.

It could only recognize and enforce a lien created by the acts of the parties, and they created none.

Our law does not recognize equitable attachments. *Bigelow et al. v. Andress et al.* 31 Ill. 323. This proceeding would virtually be one, if it could be sustained as to the lands involved.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

TUG BOAT E. P. DORR

v.

ASA D. WALDRON *et al.*

1. **BOATS AND VESSELS—statutory lien—release.** The lien given on boats and vessels for supplies, etc., is not created by the levy of an attachment writ, but by statute, and the levy is but a means furnished to enforce the lien. Therefore, where a tug boat was discharged from attachment by order of the court, on the execution of a bond by the owners as allowed by the statute, and the attachment suit under which the levy was made, was dismissed by the plaintiff, it was *held*, that the statutory lien was not thereby released, and a plea in a second suit by attachment, of the discharge of the vessel by the giving of bond in the prior suit, was adjudged bad on demurrer.

2. **CONFLICT OF LAWS—jurisdiction of State and Federal courts.** The jurisdiction of the United States District Courts on the lakes and navigable waters connecting the same, is governed by the act of Congress of February 3, 1845, and is not exclusive, but is concurrent with such remedies as may be given by State laws.

3. A maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port; and in respect to such contracts, it is competent for the State legislatures to create such liens as they

62	221
129	687
62	221
36a	22
62	221
90a	4382

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may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations for their enforcement.

4. The proceedings by attachment given by the statutes of this State against boats and vessels to enforce liens for supplies, etc., have no resemblance to libels in the courts of admiralty, but are of the same character as ordinary suits by attachment, requiring notice to be given of the pendency of the suit, and by them no prior liens are interfered with. They are not proceedings in admiralty such as the district courts of the United States are invested with exclusive jurisdiction over by law.

5. JURISDICTION—*objection to not made in court below.* On appeal from the judgment of the Superior Court of Chicago rendered in a suit by attachment against a vessel for supplies furnished, it was objected that the proceedings failed to show that the court had jurisdiction, and that the affidavit did not show that the supplies were furnished at the home port of the vessel, and that she was a domestic vessel: *Held*, that as the objection was one that might have been obviated by amendment, if made in the court below, it came too late when urged for the first time in this court.

6. SAME—*presumption.* In the absence of a bill of exceptions preserving the evidence, this court will presume that every fact necessary to bring the case within the jurisdiction of the court and establish a cause of action was proved on the trial.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. WILLIAM H. CONDON, for the appellant.

Mr. NORMAN C. PERKINS and Mr. J. A. CRAIN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an attachment under the act of 1845, brought to the Superior Court of Chicago at the June term, 1870.

The proceedings were regular under the statute, by affidavit, bond, statement of the cause of action, and bill of particulars, on which a writ of attachment issued, and was levied on the tug boat in question, "E. P. Dorr," and by reading the writ "to Joseph Moffett, owner of said tug boat."

The boat appeared by attorney and pleaded *nil debit*, and a special plea as follows :

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And for a further plea in this behalf, the defendant says, *actio non*, because it says, true it is that plaintiffs had, on December 18, 1869, a good and valid lien against, and on said defendant for supplies furnished to said defendant for the sum of money in said declaration mentioned, and on said date caused a writ of attachment to be issued out of and under the seal of the circuit court of said Cook County and the State of Illinois, being a court of record of superior jurisdiction, against the defendant, authorizing and directing the seizure and detention of the defendant with its engines, machinery, sails, rigging, tackle, apparel, and furniture, by the sheriff of said Cook County; that by virtue of said writ of attachment, the sheriff of said Cook County, on the 18th day of December, 1869, aforesaid, did attach, seize, and detain said defendant, with its engines, machinery, rigging, sails, tackle, apparel, and furniture, until the 28th day of March, 1870, when said defendant was released from custody of said sheriff, by the order of the Hon. E. S. Williams, judge of said circuit court, upon the bond of Joseph Moffett (the owner of said defendant), and W. S. Swan, which said bond was approved by said Hon. E. S. Williams, judge of said circuit court, on said March 28, 1870, which said bond released said defendant from the lien sought to be enforced in said suit; that said plaintiffs filed their declaration in said circuit court, on December 20, 1869, and defendant filed its plea and affidavit of merits in due time thereafter in time to prevent default; and said cause was at issue in said circuit court from the filing of said plea by defendant, until the 21st day of June, 1870, when said suit was dismissed at said plaintiffs' costs by said plaintiffs' attorneys, and this suit commenced by said plaintiffs for the same supplies mentioned in the suit previously begun in the circuit court as aforesaid.

And this the defendant is ready to verify, wherefore, etc.

To this plea there was a demurrer, which the court sustained.

The cause was then, by agreement, submitted to the court,

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who found for the plaintiffs twelve hundred and sixty dollars and costs, and rendered judgment for the same.

To reverse this judgment the defendant appeals, the bond being executed by Joseph Moffett, describing himself as "of the city of Cleveland, in the State of Ohio, and sole owner of the tug E. P. Dorr."

The only question presented by the pleadings is the decision of the court upon the demurrer to the second plea.

The point presented by that plea is the fact that a prior attachment had been sued out of the circuit court against this tug, by which she was held until the 28th day of March, 1870, when she was released from the custody of the sheriff by the order of the circuit judge on the execution of a bond by Joseph Moffett, the owner, and one W. S. Swan. The cause was at issue in that court until the 21st day of June, 1870, when the suit was dismissed at the costs of the plaintiffs, and the present suit immediately thereafter, and on the same day, was commenced.

Appellant contends that the act in question being in derogation of the common law, should be construed strictly, so that when a boat is discharged upon bond being given the boat would be released from the lien sought to be enforced, and would only be liable to be taken and sold on execution issued on the judgment obtained against the boat, or upon the judgment which might be rendered upon the bond. The point appellant makes is, that the release of the tug by order of the circuit judge, on the execution of the bond, forever discharged the boat from the lien which appellees originally had on it, and that they must now look to their bond or resort to their common law remedy against the owner of the vessel.

Appellant cites, in support of his views, *Martin v. Dryden et al.* 1 Gilman, 187, and *Conn et al. v. Caldwell*, id. 531.

These cases were under the general attachment law, under the operation of which a lien is created by the levy of the writ of attachment. It follows, necessarily, when the writ, or the suit consequent upon it, is dismissed the lien is gone; but no one ever supposed that another lien could not be had by the

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levy of another writ in another suit. In this case the lien was not created by the levy, but the levy was to enforce a lien created by law, and existed independent of a levy.

An abortive attempt to foreclose a mortgage by suit, when the cause was not tried on its merits, but dismissed on the plaintiff's motion, would destroy no lien created by the mortgage.

Another point made by appellant is, that it does not appear from the papers and proceedings in the cause that the Superior Court had jurisdiction.

This point was not raised in the court below in any form, and is now raised here for the first time, and it is based on the ground that the affidavit does not show the supplies were furnished at the home port of the vessel, and that she was a domestic vessel. *Tug Montauk v. Walker*, 47 Ill: 335.

Had this point been made in the court below the plaintiffs then might have taken leave to amend. *Frink et al. v. King, Adm'r*, 3 Scam. 144. It is now too late to make the objection.

The general question of the jurisdiction of a State court as conferred by the acts of 1845 and 1857, are considered at some length in *Williamson v. Hogan*, 46 Ill. 504, and the *Tug Montauk v. Walker*, *supra*, and *Schooner Norway v. Jensen*, 52 id. 373, with reference to the decision of the Supreme Court of the United States in *The Hine v. Trevor*, 4 Wal., and other cases decided in the same court.

In "The Hine" case the court say, "We are sensible of the extent of the interests to be affected by our decision, and the importance of the principles upon which that decision must rest, and have held the case under advisement for some time, in order that every consideration which could properly influence the result might be deliberately weighed."—P. 561. It was then distinctly announced that the jurisdiction of the District Courts of the United States, on the lakes and navigable waters connecting the same, was governed by the act of 1845, and that the jurisdiction is not exclusive, but expressly made concurrent with such remedies as may be given by State laws.—Pp. 566-569.

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The Hine v. Trevor was an action for a collision of steamboats running on the Mississippi River. It was decided to be a maritime tort, and cognizable exclusively in the admiralty, by force of the judiciary act of 1789, and properly, as that river was navigable from the sea by vessels of ten or more tons burden.

At the same term the case of "the *Moses Taylor*" was decided. *id.* 411. That action was on a contract to transport a passenger by sea from New York to California, clearly a maritime contract, wholly to be performed on the sea, and of which a court of admiralty had exclusive jurisdiction, under the act of 1789. The act of 1845 had no place in the discussion, it was not alluded to by counsel or court, nor could it have been, the only question being, was the remedy given by the act of the legislature of California within the saving of the act of 1789? These cases were decided in 1866.

The next, in order of time, was the case of "*The Belfast*," 7 Wallace, 624, decided in 1868.

It arose in the State of Alabama on a contract of affreightment of cotton between ports in that State, and was prosecuted under an act of the legislature of that State, entitled, "proceedings in admiralty," by which a lien was created on the vessel, and proceedings to enforce it were allowed; in which, if there was more than one complaint, all were to be consolidated, and the court was required to render but one judgment against the vessel, and that, condemning *ex parte* the boat, tackle, etc., to be sold in satisfaction of the claims, and the affidavit of complainant was made presumptive evidence of the justice of the demand; and by a proviso to the act it was enacted, "unless when otherwise provided in this chapter, the proceedings to enforce the lien shall be the same as in the courts of admiralty of the United States; but either party may have any question of fact decided by a jury, upon an issue made up under the direction of the court."

There was created by this statute a court of admiralty in the State of Alabama, whose proceedings were, as in such court, strictly *in rem*, and the law was held to be of no effect,

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as it trench'd upon the exclusive jurisdiction of the Federal courts in such cases.

The ground assumed by the libellants was, that the State court had jurisdiction under that clause of the judiciary act of 1789 (section 9), which saves "to suitors in all cases the right of a common law remedy when the common law is competent to give it."

The theory of the defendants was that the libels were libels *in rem*, to enforce a maritime lien in favor of the shippers of the cotton under the contracts of affreightment for its transportation from one port to another, upon navigable waters, and that the State courts had no jurisdiction to employ such a process to enforce such a lien in any case; that the jurisdiction to enforce a maritime lien by a proceeding *in rem*, was exclusively vested in the Federal courts, by the Constitution of the United States, and the laws of Congress.

The court in the discussion of these questions make but a bare allusion to the act of 1845, and in terms of approval as we understand them. They say, "Remarks, it is conceded, are found in the opinion of the court, in the case of *Allen et al. v. Newberry*, 21 Howard, 245, inconsistent with these views; but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the western lakes where the jurisdiction in admiralty is restricted, by an act of Congress, to steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories"—referring to *The Hine v. Trevor*, *supra*.

The court further say, "No such restrictions are contained in the ninth section of the judiciary act, and consequently those remarks, as applied to a case falling within that provision, must be regarded as incorrect."

A further allusion is made to the act of 1845, in commenting upon the decision in "*The Magnolia*," 20 Howard, 296, in which the court held that the district courts exercise jurisdiction over fresh water rivers, "navigable from the sea" by virtue of the ninth section of the judiciary act, and not as con-

ferred by the act of the 20th of February, 1845, which is applicable only to "the lakes and navigable waters connecting said lakes."

The libellants contended that the saving clause in the judiciary act gave a remedy in the State courts—that they had, by that act, concurrent jurisdiction, but the court say, nothing is said in that act about a concurrent jurisdiction in a State court or in any other court, and it is quite clear that in all cases where the parties are citizens of different States, the injured party may pursue the common law remedy here described and saved, in the circuit court of the district as well as in the State courts.

They say, "Original cognizance is exclusive in the district courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the State courts or in the circuit court, as before explained, in all cases where such a remedy is applicable. Common law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*," etc.; and further, "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem* as practiced in the admiralty courts."

This was all well said, doubtless, as applicable to the Alabama State law where the proceedings were designed to be *in rem* as practiced in the admiralty courts.

But in concluding the opinion the court say, "Such a lien (a maritime lien) does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts, it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement," referring to "*The General Smith*," 4 Wheaton 438, and is the ground assumed by this court in *Williamson v. Hogan*, 46 Ill. 504.

It will be noticed, nothing is said in "The Belfast," about the saving clause of the act of 1845, though, regarding in

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the most unqualified terms, the operation of that act on our lakes and rivers.

At the same term of the court came on the case of the steam tug "Eagle," 8 Wal. 15.

This was an appeal from the district court for the eastern district of Michigan, in which the question made on this record, was not before the court in any shape. It was there held that this act of 1845 was obsolete and inoperative. Since the decision in "The Genessee Chief," 12 How. 243, in which it was held that the jurisdiction of the district courts in such cases extended over all the navigable waters of the United States, without regard to the ebbing and flowing of the tide.

In the opinion delivered in that case by Chief Justice Taney, it is nowhere intimated that the act of 1845 was not, what it purported to be, an act to extend the jurisdiction of those courts, and valid, and binding, and operative. That case arose under that act, and was prosecuted under it.

The effect of the decision was to overrule the many prior decisions of that court upon the question of the limit of the jurisdiction of the district courts. The chief justice said, in that very case, that the act of 1845 was a limitation of the powers previously conferred on the Federal courts.

The opinion in the case of "The Eagle," *supra*, declares the act is obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which, the court say, is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act as to the concurrent remedy at common law, is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect.

It will be seen, the question raised in the case before us, was not a question in "The Eagle," and whatever may have been said touching it was *obiter*.

We had thought there might be a necessity for the act of February 3, 1845, inasmuch as by the judiciary act of 1789, admiralty jurisdiction extended only to such waters as were

navigable from the sea by vessels of ten tons burden and upward. The lakes were not so navigable.

The important saving in the act of 1845 "saving any concurrent remedy which may be given by the State laws; when such steamer or other vessel is employed in such business of commerce, and navigation" is omitted from the consideration of the court. It is not decided Congress was incompetent to enact such a clause. It would seem if that body could provide a saving of one kind it could another, and here it is provided, in the record, in express terms.

The record contains no bill of exceptions preserving the evidence. Every intendment, therefore, must be indulged in favor of the finding of the court as in the case of the verdict of a jury. We will presume, in the absence of the evidence, that every fact requisite to bring the case within the jurisdiction of the court, and establish a cause of action under the statute, was proved upon the trial.

The proceedings have no resemblance to those in courts of admiralty, but are of the same character as in an ordinary attachment under the statute, requiring notice to be given of the pendency of the suit, and no prior liens are interfered with. *Germain v. Steam Tug Indiana*, 11 Ill. 535; *The Belfast*, *supra*.

For the reasons given the judgment is affirmed.

Judgment affirmed.

THE PROPELLER HILTON

v.

THOMAS E. MILLER *et al.*

1. ATTACHMENT OF VESSEL—*setting aside default.* After judgment by default against a vessel in a proceeding by attachment for supplies, and, at the same term of court, a party applied to the court to have the default set aside and permit him to come in and defend the action as owner of the vessel, based upon his affidavit of ownership acquired by purchase on a sale of the vessel under a mortgage, which was a prior lien. In the attachment proceeding no owner of the vessel was named in the affidavit, statement of the

Syllabus. Opinion of the Court.

claim, or warrant, and there was no published notice to any one of the pendency of the suit. The court refused the application: *Held*, that the court erred in the refusal.

2. LIEN on boat for supplies—priority. A prior mortgage on a vessel, duly recorded, has precedence of a lien of a material-man subsequently acquired.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. E. G. HOOKE, for the appellant.

Messrs. RAE & MITCHELL, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

We have nothing to add on the general question of jurisdiction in cases like this, to what has been said by this court in *Williamson v. Hogan*, 46 Ill. 504; *Tug Montauk v. Walker*, 47 id. 335; *Schooner Norway v. Jensen*, 52 id. 373; and *Tug Boat Dorr v. Waldron et al.*, *ante*.

We have confined our examination of the record to one point only made upon it, and that is the refusal of the court to set aside the default on motion and affidavit of Staples, and permit him to come in and defend the action as owner of the vessel.

In the affidavit, statement of the claim, and warrant, no owner is named, and there was no published notice to any one of the pendency of the attachment. Under such circumstances, where the proceeding is *in rem*, any one who may, by affidavit, show a right to the *res*, should be permitted to defend, and thus protect his title.

It is a right, of which a party can not be deprived.

It is true, in the *præcipe*, Horatio Hill is named as the owner, and a summons issued against him, but it does not follow he was the true owner. Staples had a right to come in and contest the fact at the threshold of the proceeding, and not be forced to resort to an action of replevin or to a bill in chancery.

Syllabus. Opinion of the Court.

For this error the judgment is reversed and the cause remanded, with instructions to the Superior Court to admit Staples as defendant.

That a prior mortgage on a vessel has precedence of the lien of a material-man, subsequently acquired, is settled by the case of the *Barque Great West No. 2 v. Oberndorf*, 57 Ill. 168.

*Judgment reversed.**

ALFRED GREGORY .

v.

LEGRAND L. WELLS.

1. **TENDER**—*after suit*. In a suit to recover unliquidated damages for breach of contract, the defendant filed a plea averring a tender of money after suit brought, to which the court sustained a demurrer: *Held*, that the plea was not a good defense, either at common law or under our statute.

WRIT OF ERROR to the Circuit Court of Iroquois County ;
the Hon. CHARLES R. STARR, Judge, presiding.

Messrs. ROFF & DOYLE, for the plaintiff in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This suit was instituted upon a written contract to deliver corn, and damages are claimed for its breach.

A plea of tender was interposed, averring a tender of money after the commencement of the suit, to which a demurrer was sustained.

*THE PROPELLER HILTON v. ELLIS *et al.*

BRESEE, J.: This case is, in all respects, like the next preceding case, *Propeller Hilton v. Miller et al.*, and must be decided in the same way.

The judgment is reversed and the cause remanded, with the same instruction as in that case.

Opinion of the Court. Syllabus.

The damages to be recovered were for a breach of the contract, and were unliquidated.

In such case this court has decided, in *Cilley v Hawkins*, 48 Ill. 309, that a plea of tender is not a good plea, either at common law or under our statute.

The demurrer was properly sustained and the judgment is affirmed.

Judgment affirmed.

TOLEDO, PEORIA & WARSAW RAILWAY COMPANY

v.

HENRY B. HEAD.

1. NEGLIGENCE—*contributory*. The plaintiff, working upon a bridge across defendant's railroad track, with knowledge of an approaching train, called to his little boy, eleven years old, to lead his horse across the track. In doing so the horse, through fright, escaped and got upon the track and was killed by the train. The proof failed to show negligence in the company: *Held*, that a verdict against the railroad company for the value of the horse could not be sustained; that the plaintiff was guilty of great negligence on his part, and that the law did not require a railroad company to ring a bell at such a place, it being only a farm crossing.

APPEAL from the Circuit Court of Woodford County; the Hon. S. L. RICHMOND, Judge, presiding.

Messrs. BRYAN & COCHRAN, for the appellant.

Messrs. BURNS & BARNES, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The testimony in this case is too uncertain and unsatisfactory to justify an affirmance of the judgment.

Opinion of the Court.

One witness only was cognizant of the circumstances attendant upon the killing, and we can not ascertain from his statements that any negligence is to be attached to the company.

This witness and appellee were at work upon a bridge across the railroad track when the latter, with knowledge of the approaching train, called to his little boy, eleven years of age, to lead the horse across the track. In doing so the horse became frightened, escaped from the boy, got upon the track, and was killed by the train.

The witness further testified that the boy had crossed the track of the road and was taking the horse south when he was killed.

We are not informed whether the horse was on the right of way, when he broke loose, nor the distance between the approaching train and the place of crossing.

From such proof we can not infer negligence against the company; but rather very great negligence on the part of appellee.

The order to the boy, in view of the train, and, for aught that appears, so near to the crossing as to render it impracticable to check its impetus before reaching it, was extremely reckless.

The evidence does not show that the accident happened by reason of the neglect to fence the road; and the negligence of appellee exculpates the company from liability on account of such negligence.

The corporation is not chargeable by failure to ring the bell or sound the whistle. The crossing was a farm crossing, and at such place the law imposes no such duty.

The inhumanity and barbarism depicted by appellee's counsel on the part of appellant do not appear in the record.

The judgment must be reversed and the cause remanded.

Judgment reversed.

KANKAKEE & ILLINOIS RIVER RAILROAD COMPANY

v.

HANNAH E. CHESTER.

62	235
97a	*600
62	285
198	*218
62	285
208	*404

1. **ASSESSMENT OF DAMAGES—right of way.** In a proceeding to condemn a strip of land for a right of way by a railroad company through a party's farm, consisting of several tracts, both parties, on the trial, treated the farm as a single tract in their examination of witnesses and instructions, and the jury fixed the compensation and the owner's damages as upon one tract. Upon appeal, the company, for the first time, objected that the finding should have applied to each tract separately: *Held*, that the objection could not be urged for the first time in the appellate court. The question could not even be raised on motion for a new trial.

2. **ERROR—objections waived by silence.** It is a rule of general application in courts of law that if a party acquiesces in the mode of conducting a cause by his adversary, by failing to object and except in apt time, then whether the objection pertain to the introduction of evidence, the measure of damages, or instructions to the jury, he will be precluded from raising it in the appellate court.

APPEAL from the Circuit Court of Livingston County;
the Hon. CHARLES H. WOOD, Judge, presiding.

Mr. THOS. P. BONFIELD, for the appellant.

Mr. L. E. PAYSON & Mr. J. T. CULVER, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

This was a proceeding instituted by appellant to condemn for its use as a right of way a strip of land one hundred feet wide running through appellee's farm. It appears that the farm comprised several tracts, containing in all four hundred and forty acres, lying together in one body and under cultivation.

Upon the trial in the court below, before a jury, both parties,

Opinion of the Court.

as appears by the record, treated the farm as one tract, without objection, by the introduction of evidence and instructions to the jury; and the jury fixed the compensation and assessed appellee's damages as upon one tract.

Now, upon appeal to this court, appellant for the first time raises the question and insists that the jury should have fixed compensation and assessed damages as to each tract comprising the farm, separately.

We shall not enter into any construction of the statute with reference to the question, because if it gives the right as claimed by appellant, still it is one that may be waived; and appellant having, all through the trial, both as respects the examination of witnesses and asking instructions to the jury, treated appellee's farm as a single tract, and remained silent as to the right now insisted upon, we must regard it as having waived the right.

It is not a question affecting the jurisdiction of the subject-matter, and, aside from such questions, it is a rule of general application in courts of law, that if a party acquiesce in the mode of conducting a cause by his adversary, by failing to object and except in apt time, then, whether the question pertain to the introduction of evidence, the measure of damages, or instructions of the court to the jury, he will be precluded from raising it in the appellate court. Nor can it be raised by a motion for a new trial in the court below. Here the appellant not only failed to object to appellee's evidence, which treated the whole farm as one tract, but expressly acquiesced in it by the introduction of evidence in the same way. No grounds are stated in the motion for a new trial, and to be allowed to start the question here, for the first time, would operate as a snare and surprise upon the appellee, which the law will not tolerate. The judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

EARL G. BARTON

v.

TIMOTHY MOSHER.

1. PARTIES IN CHANCERY. On bill in equity against an assignee to whom effects were assigned for the benefit of creditors, to have an indebtedness from the assignor set off against a judgment recovered by the assignee against the complainant; the proof showed that the debts against the assignor yet unpaid were inconsiderable in amount, and that there was an abundance of assets in the hands of the assignee to pay them: *Held*, that it was unnecessary to reverse the decree in order that those other creditors might be made parties.

2. COSTS—*chancery*. The award of costs in chancery suits is a matter of discretion with the court below.

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was a bill in chancery filed by Mosher, the appellee, against appellant, Earl G. Barton, assignee of Daniel N. Barton. The assignment was made for the benefit of creditors. The assignee sold certain personal property to one Cook, for which he gave his note of \$500 with the appellee as security. The assignee recovered judgment on this note against appellee for \$666.05, there being no service on Cook. Daniel N. Barton was largely indebted to the appellee, and the debt was intended to be secured in the assignment. The bill showed the death of Daniel N. Barton, insolvent, the taking possession of all his effects by Earl G. Barton as assignee, and his insolvency, and prayed to have the indebtedness due complainant set off on the judgment, and for an injunction. The court rendered a final decree on the hearing, making the injunction perpetual as to \$574.35 of the judgment, and ordered Mosher to pay the balance of that judgment less the costs of suit.

Messrs. CRAIG & HARVEY and Mr. G. C. LANPHERE, for the appellants.

Messrs. KITCHELL & ARNOLD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The open accounts on each side in this case were properly disregarded by the court. They were nearly balanced, and the proof in regard to them was unsatisfactory.

Leaving them out of view, we think the amount of the set off, which the court allowed against the judgment, is correct, and that neither party has just ground to complain of its allowance.

The proofs show that the debts of the assignor existing at the time of the assignment, which remain unpaid, are inconsiderable in amount; that there are abundant assets in the hands of the assignee to pay them; and we deem it unnecessary to reverse the decree in order that the creditors to whom these debts are due may be made parties.

The award of costs was discretionary with the court below, and we do not feel called upon to interfere with the exercise of that discretion in this case.

The decree of the court below is affirmed.

Decree affirmed.

CHICAGO CITY RAILWAY CO.

v.

ELLEN YOUNG, Adm'r, etc.

1. *NEW TRIAL—finding as to facts.* Unless a verdict is manifestly against the evidence, and is to be attributed to the passion or prejudice of the jury, or to a misapprehension of the facts, the judgment thereon should not be disturbed.

2. *NEGLIGENCE—liability for death caused by.* It is the duty of a street railway company to carry their passengers with safety; and if the death of a passenger results from the carelessness of its servants in the management of its car, or from a defective track, or from an overloaded car, or from all combined, the company will be liable.

3. *EVIDENCE—weight of.* When the testimony of the witnesses is con-

Opinion of the Court.

flicting as to any material fact, the weight to be given to one witness more than to another should be left to the jury.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. HITCHCOCK, DUPEE & EVARTS, for the appellant.

Mr. MELVILLE W. FULLER, for the appellee.

Per CURIAM: The sole ground upon which a reversal is sought, is that there is no evidence to sustain the verdict.

Unless the verdict is manifestly against the evidence, and is to be attributed to the passion or prejudice of the jury, or to a misapprehension of the facts, the judgment should not be disturbed.

The deceased was a passenger on the car of the company, and it was its duty to carry him safely. If the death resulted from the carelessness of the servants of the company in the management of the car, or from defective track, or from an overloaded car, or from all combined, then the company is liable.

Upon first entering the car, the deceased obtained a seat. The car, from some cause, ran off the track; and the conductor requested the assistance of the passengers to put it on. The deceased did not regain his seat, and from the crowded condition of the car was compelled to stand on the front platform. Thus he was brought into close proximity to the brake, which was used by the driver, at or about the time of the accident. The jury might fairly have inferred, that he was thrown from the platform by the sudden turning of the brake.

One witness testified, that the driver stopped the car and then started again, "and whirled his brake around;" and within a second or two after, the misfortune occurred. Another witness testified to a "surging motion," and a "jarring" of the car; and that this was attributed to the condition of the track.

The jury were justified from the evidence in the conclusions, that the car was greatly overloaded; that the track, about the

Opinion of the Court. Syllabus.

Mr. JUSTICE SHELDON delivered the opinion. The case was care-fully considered on the platform.

The open accounts on each side in this case on the part of the defendant were disregarded by the court. They were near-ly equal, as is usual in such cases, and the proof in regard to them was unsatisfactory. They contradict each other.

Leaving them out of view, we think the evidence is in favor of the plaintiff. The court allowed against the defendant more than another, has been, and that neither party has just ground by the jury.

The proofs show that the defendant's attempt to reconcile conflicting evidence, when fairly balanced, and to determine the time of the assignment, and the testimony of the witnesses, would be a usurpation of the power of the court. The court is not to be reversed by the jury. The decree is affirmed.

The award of costs is affirmed. The defendant having been of counsel in the court below, and we do not find any error in the decision.

The decree

WILLIAM KELSEY REED, impleaded, etc.,

v.

GERTRUDE V. REBER *et al.*

1. CORONER—service by a deputy. When the office of sheriff has become vacant by his continued absence, the coroner becomes *ex-officio* sheriff, and all the rights, powers, and duties of the sheriff will devolve upon him until the vacancy is filled in some other legal mode; and service of process by his deputy will be legal.

2. CHANCERY—cloud on title—tax title. Equity has jurisdiction to enter a bill to remove a cloud upon title occasioned by an outstanding tax title, when no notice of the sale for taxes, and of the time when the redemption will expire, was served upon the parties in possession before taking out a deed, as required by the constitution.

3. SAME—relief. On bill to remove a cloud caused by a tax title acquired without service of any notice on the parties in possession, the circuit court decreed that the holder of the tax title convey his title to complainant. There was nothing in the bill showing that there was any contract, trust relation, or other equitable grounds requiring the party to convey his tax title.

Syllabus. Opinion of the Court.

was erroneous. The proper decree in such case is, order of the outstanding title, his heirs and as-

ait Court of Cook County; the Hon.
se, presiding.

in chancery to remove a cloud occasioned by
quired by the appellant on a sale for taxes in Au-
The objection to the tax deed, among other
was, that the purchaser did not notify the person in
the name the land was taxed, and the person in possession,
three months before the expiration of the time of redemption,
of the time when the redemption would expire.

The summons was returned served, and the return was signed
"B. S. Cleaves, coroner, and *ex-officio* acting sheriff, by T. E.
Stacy, deputy."

Mr. GEORGE SCOVILLE, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a suit in equity, brought by appellees, in the Cook
circuit court, against appellant for the purpose of removing a
cloud on the title of certain lots held by appellees. No answer
having been filed, the bill was taken as confessed; the case re-
ferred to the master, who reported the evidence upon which the
court found the tax deed void, and decreed that appellant, his
heirs and assigns, be enjoined from relying upon, or asserting
any claim under his tax title, and that he convey his title by
deed of release to appellees.

We perceive no objection to the manner in which the serv-
ice was had. The coroner, by the continued absence of the
sheriff, had become, and was, *ex-officio*, the sheriff of the coun-
ty. And being such, all the rights, powers, and duties of the
sheriff devolved upon him. He thereby was authorized to ap-
point a deputy, that being a power expressly conferred upon
the sheriff. By the vacancy of the office of sheriff, until the
same was filled by election, or some other legal mode, the coro-

Opinion of the Court. Syllabus.

ner succeeded to the office, and was required, by law, to discharge all the duties imposed by law upon the sheriff. There was no error in serving the summons by the deputy.

In the case of *Reed v. Tyler*, 56 Ill. 288, it was held that a bill in equity would lie to remove the cloud occasioned by an outstanding tax title. In that case, the terms and conditions upon which such relief should be granted, are fully discussed, and we deem it unnecessary to repeat them here.

But in this case, the court erred in requiring defendant below to convey his tax title to complainants. There is nothing in the bill to show that there was any contract, trust relation, or other equitable grounds, requiring appellant to convey his title to complainants. The proper relief in such cases, is, that the holder of the outstanding title, his heirs and assigns, be perpetually enjoined from its assertion. For this error the decree of the court below is reversed, and the cause remanded.

Decree reversed.

62 242
131 630

62 242
111a 4616

THE MERCHANTS' INSURANCE COMPANY OF CHICAGO

v.

EZEKIEL MORRISON.

1. *MARINE INSURANCE—implied warranty.* By the rules of the law merchant and the common law, every voyage policy of insurance of a vessel implies a warranty of seaworthiness, and this warranty relates to the beginning of the risk, and that is when the vessel sails. Seaworthiness at the commencement of the voyage is a condition precedent, and if it does not then exist the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause.

2. *SAME—extent of warranty.* This implied warranty imports that the ship is staunch and sound; of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchors, stores, and supplies; a captain of competent skill and capacity; a competent and sufficient crew; a pilot when necessary, and, generally, that she is, in every respect, fit for the voyage insured.

Syllabus. Opinion of the Court.

3. *SAME—time policy.* But when a vessel was insured from the 1st day of April to the 30th day of November, 1869, against perils of the lakes, rivers, canals, fires, and jettison, excepting all losses, perils, misfortunes or expenses arising from incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating the vessel, and in loading, stowing, and securing the cargo, rottenness, inherent defects, overloading, and all other unseaworthiness, etc., and the policy contained an express warranty that the vessel was then in safety, and as to the business for which she was to be used, and the same was destroyed by fire while in port, not resulting from unseaworthiness: *Held*, that this being a time policy, as distinguished from a voyage policy, the law did not imply a warranty that the vessel should be seaworthy when she set out upon her first voyage, and that the company was liable for the loss.

4. *CONTRACT—presumption.* It is a general rule of law that when parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. In such case to add to it by implication would be to vary its terms and legal effect.

APPEAL from the Superior Court of Cook County.

Messrs. HITCHCOCK, DUPEE & EVARTS, for the appellant.

Mr. H. S. MOORE and Mr. SIDNEY SMITH, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court:

In June, 1868, the appellee, being engaged in the lumber business at Muskegon Lake, in Michigan, became the owner of the then propeller "Omar Pacha."

This lake is situated some five miles from the east shore of Lake Michigan, is connected with the latter by a navigable river called the Muskegon River; constitutes a safe harbor, and is known as the Port of Muskegon. During the remainder of the season of 1868, after appellee became the owner, the propeller was employed by him in the lumber trade between that port and Chicago; at the close of navigation the vessel was

Opinion of the Court.

taken to the Muskegon harbor, where she remained until the 10th of April, 1869; during the winter of 1868-69 she was thoroughly overhauled, repaired, and changed into a lumber barge, the work and repairs costing upward of ten thousand dollars. On the 1st of April, 1869, while the vessel was still in that harbor, through the action of an insurance agent and solicitor a policy of insurance upon the body, tackle, apparel, and other furniture of this vessel was issued by appellant to appellee, insuring the same in the sum of three thousand dollars, from noon of the 1st day of April, 1869, to noon of the 30th day of November, 1869. This was a valued policy, containing an express warranty on the part of the assured that the vessel was then in safety; that she was to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and River St. Lawrence to Quebec, usually navigated by vessels of her class during the portion of the life of the policy between noon of April 1st and noon of November 30th.

The perils insured against were of the lakes, rivers, canals, fires, and jettison, excepting all perils, losses, misfortunes, or expenses consequent upon, and arising from or caused by the following or other legally excluded causes, viz.: * * "Incompetency of the master, or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing and securing the cargo of said vessel, rottenness, inherent defects, overloading, and all other unseaworthiness," etc.

The policy contained the usual recital of payment of the premium.

The vessel remained in the port where the repairs had been made, where she was at the time the policy was issued, until the 10th day of April, 1869, when, being laden with a cargo of lumber, she set out upon a voyage to Chicago. She continued engaged in the lumber trade between those ports until the 8th day of October, 1869, and then, while lying at a dock in the

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Muskegon harbor, and during the life of the policy, she was consumed by fire, not the result of unseaworthiness.

The usual protest, proof of loss and abandonment necessary to charge the underwriters, having been made and the appellant having refused to pay the amount insured, this action was brought upon the policy. The cause was tried before the court and a jury; after hearing the evidence, which was conflicting, the jury returned a verdict in favor of the assured, upon which judgment was rendered, and the case brought to this court by appeal.

A single question of law has been presented and discussed in this court. Upon the trial the court permitted the insurance company to introduce evidence tending to show the want of seaworthiness of the vessel during the season of 1869, but with the avowed purpose of showing that she was unseaworthy at the time of setting out upon her first voyage after the insurance. Many witnesses were examined as to this point, upon both sides; but when we consider the presumption of law that she was seaworthy, the clear and satisfactory evidence of the thorough overhauling and repairs which she had received immediately previous to setting out upon such voyage, and contrast the strength of appellee's case with that sought to be made by appellant, it seems to us that the clear weight and preponderance of evidence are with the appellee. Nevertheless, there was sufficient to warrant appellant in asking the court to submit the question of fact to the jury, if the counsel were right in their law as involved in the following instruction, which the court refused:

"The jury are instructed that the law implies a warranty on the part of the plaintiff that the 'Omar Pacha' was seaworthy on setting out, upon her first voyage after the time from which the policy was to take effect, provided she set out on such voyage from a port in which proper repairs could have been made; and if they believe, from the evidence, that she was not seaworthy when she left such port on such voyage they will find for the defendant."

The refusal to give this instruction forms the basis of appel-

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lant's argument. The policy, we have seen, was made on the first day of April, 1869, whereby the vessel was in terms insured against certain perils, among which were those of fire, from noon of that day. Under these circumstances, did the law imply a warranty that the vessel should be seaworthy when she set out upon her first voyage from that port; and was it requisite that she was seaworthy at that time, in the sense of that term as applied to voyage policies, in order to make the policy attach and charge the insurer for a subsequent loss by fire not arising from want of seaworthiness? We think not. To so hold would not be the mere recognition of a condition to the policy by implication of law, and in respect to which the contract was silent, but would be to vary its terms and legal effect.

It is a general rule of law that when parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. 1 Greenleaf Ev. Sec. 275.

There was no attempt to interpret or explain any of the terms of the policy by offering proof of any known and established usage respecting the subject, so that the position assumed must have its foundation, if it have any, in the peculiar rule of the law merchant and the common law—that every voyage policy implies a warranty of seaworthiness. Then, what is that warranty? It imports that the ship is staunch and sound, of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchors, stores, and supplies; a captain of competent skill and capacity; a competent and sufficient crew; a pilot when necessary, and, generally, that she is, in every respect, fit for the voyage insured. This warranty relates to the beginning of the risk, and that is when the vessel sails. 2 Greenleaf Ev. Sec. 400; 3 Kent's Com. 289.

And it is the general rule that the vessel must be seaworthy in the sense mentioned, at the commencement or inception of

Opinion of the Court.

the risk, in order that the policy attach and charge the insurer. Seaworthiness at the commencement of a voyage is a condition precedent, and, if it does not then exist, the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause. *Prescott v. U. S. Ins. Co.*, 1 Whart. 399; *Starbuck v. N. E. Ins. Co.*, 19 Pick. 199; *Capen v. Washington Ins. Co.*, 12 Cush. 517.

These are inflexible, arbitrary rules of the common law, and are as applicable to risks of that character upon our lakes as upon the high seas. But their applicability to time policies was seriously questioned, if not denied, in *Capen v. Washington Ins. Co.*, above cited; and Chief Justice Shaw pointed out some of the distinctions between the two kinds of policies with his usual clearness and force. Afterward, the case of *Gibson v. Small* came up in the English House of Lords (24 Eng. L. & Eq. 17), involving the question of implied warranty of seaworthiness in the case of a time policy, in the sense of its application to a voyage policy. The subject was most elaborately discussed by the several judges, and the distinguishing features of the two kinds of instruments were pointed out with admirable perspicuity. There, however, the policy was upon a vessel in an unknown sea, and in an unknown condition; but in the case of *Thompson v. Hopper* (6 El. & Bl. 172; 34 Eng. L. & Eq. 266) the action was upon a time policy issued upon a vessel in port where the owner resided, and the court held that there was no implied warranty of seaworthiness which, if broken, would prevent the policy from attaching. See, also, *Jones v. Ins. Co.*, 2 Wallace, Jr., 278.

The question was examined in the English courts with so much research and ability that it would be idle, if not presumptuous, to attempt to throw any further light upon it; but it seems to us that the reasons assigned by the English judges against the implication of such a warranty in the case of time policies on vessels engaged in the general and ceaseless commerce of the great oceans or high seas, apply with even greater force to those on vessels engaged upon our north-western lakes, because here, from the rigor of the climate,

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vessels are generally compelled to lie, during the cold season, some four or five months in ports or harbors, imbedded in ice, and where the principal peril to which they are exposed is that of fire, and against which it is lawful for the owner to obtain insurance. But the circumstances would require a policy essentially different from the usual voyage policy. It might be expedient to make the policy cover the whole time during which the vessel was to so lie in harbor, and also that of the ensuing season of navigation. To be fully applicable to the circumstances, the policy should be made to cover the perils of fire as well as of the lakes, rivers, etc. Suppose the owner, while his vessel is fast in the ice of a Michigan or Chicago port, should obtain a policy on the first day of January, insuring her against all the perils suggested from noon of that day until noon of the thirtieth day of the following November, would there be any reason in support of the position that such a policy implied a warranty of seaworthiness as that warranty has been defined, or for holding that the operation of the policy was suspended; that the risk did not commence until the vessel set out upon her first voyage in the spring; and that, if she was not *then* seaworthy; the policy never attached at all? Yet that is the precise doctrine of appellant's instruction. It is manifest that to so hold would be to say that, upon this subject, parties were not competent to make such a contract as they thought fit; that whatever might be the necessities of the case or the terms of their contract, still the law would so control it as to make it speak a particular language, and *that* the same as another contract, which they did not make. The policy would declare, in plain language, that the risk commenced, and the policy became operative, at noon of the first day of January; but the courts, that the risk did not commence, or the policy become operative, no matter how fairly obtained, unless the vessel was seaworthy when she sailed upon her first voyage in the spring.

This is the proposition embodied in the instruction which appellant's counsel asked the court to give, the refusal of which, by the court, they have endeavored to convince us,

Opinion of the Court. Syllabus.

was error. The instruction is not based, it will be observed, upon the hypothesis, that the vessel was about to depart on a voyage when the policy issued; and the principle involved in it is all the same, whether the policy was made ten days or three months before the vessel sailed.

It would lead to great embarrassment if the vessel owner can not obtain a policy like that in question without its being arbitrarily subjected to the same rules incident to voyage policies. Aside from the circumstance of the vessel lying ice-bound for several months, is the further circumstance, that much of the commerce upon the lakes is carried on between ports which are not remote from each other.

Hence, voyages are short and quickly and frequently made. In such case there would be an obvious inconvenience in the use of voyage policies. This inconvenience, together with the other peculiarity of navigation upon the lakes we have mentioned, dictate the propriety of seeking a substitute for the usual voyage policy, in another form of contract, which, in the very necessities of the case, must be substantially different. Such a contract is the one sued upon in this case. We are of the opinion that the vessel owner, if insurance companies choose to concur in his wishes, has the legal right to adopt the substitute and enjoy it, if fairly obtained, untrammelled with the incident which the law attaches to a voyage policy.

There was, therefore, no error in the rulings of the court below, the evidence sustains the verdict, and the judgment must be affirmed.

Judgment affirmed.

TURPIN H. ARNOLD *et al.*

v.

EDWARD E. GIFFORD.

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1. JUDGMENT—*binding force collaterally.* A stranger to a judgment can not question its regularity collaterally. It may be erroneous and voidable,

Syllabus. Statement of the case.

but if the court had jurisdiction of the subject-matter and the person, its determination is conclusive until reversed by an appellate court, unless the judgment is absolutely void.

2. *SAME—impeaching for fraud.* Where the owner of an equity of redemption transferred the same to hinder and delay creditors, and afterward gave a note with a power to take judgment against him by confession, to enable a third party to levy upon and sell the land and redeem the same, and there was no consideration whatever for the note, and the holder of the note after judgment, levy, sale, and sheriff's deed for the land, filed his bill to avoid the transfer of the equity of redemption for fraud, and to redeem from the debtor's deed of the land given in the nature of a mortgage: *Held*, that as the note, which was the foundation of the judgment, was given in bad faith and without consideration, there was no debt, and consequently the judgment could form no basis in equity for the redemption.

3. *REDEMPTION by judgment creditor—fraudulent judgment.* The fact that a debtor confesses judgment in favor of a creditor for the express purpose of enabling the latter to redeem, will not invalidate the redemption, if there be no fraud in the consideration; but where judgment is confessed or procured where no debt, in fact, exists, and it is done in bad faith and fraudulently, the party seeking to redeem under such judgment, being a mere volunteer, and a party to a fraudulent plan, will receive no aid or assistance in a court of equity.

APPEAL from the Circuit Court of Grundy County.

This was a bill in chancery by Gifford, setting forth that Charles F. Washburn, being the owner of eighty acres of land in Grundy County, and indebted to C. W. & E. R. Knoblocks in about the sum of \$900, conveyed the land to them as a security, taking back a bond for a reconveyance on payment of the debt; that being indebted to Turpin H. Arnold in the sum of \$500, by an arrangement between Washburn, Arnold, and the Knoblocks, Arnold paid the debt to Knoblocks, and they conveyed the land to Mary J. Arnold, wife of Turpin H. Arnold, in security for the indebtedness, and that Mary J. gave Washburn a bond for a deed to be made when the sum due her husband was paid; that Turpin H. Arnold afterward induced Washburn to deliver up to him the bond to save his property from sacrifice at the hands of creditors, agreeing to hold the same in trust for Washburn, etc.

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The answer denied the surrender of the bond for deed to be held in trust, and claimed a *bona fide* purchase.

The Circuit Court decreed a redemption, from which an appeal was taken.

Mr. B. C. COOK, for the appellants.

Messrs. RANDALL & FULLER, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The equity of redemption, which existed in the judgment debtor, was disposed of by him to hinder, delay, and defraud his creditors. The proof abundantly shows that he surrendered the defeasance for this purpose.

He then, on the 24th day of January, 1865—nearly one year after the surrender of the defeasance—executed his note to one Lyon, payable in twenty days, with a power of attorney attached thereto to confess judgment. Lyon assigned the note to the appellee; and judgment by confession was rendered on the 16th day of February, 1865.

The answer set up that this judgment was not founded on any *bona fide* indebtedness, and that it was obtained by collusion between the parties, to defraud Mrs. Arnold of the land, which had been conveyed to her.

The proof is entirely satisfactory, if not conclusive, that there was no consideration whatever for the making of the note or for its assignment; and that the entire transaction was for the benefit of the grantor in the deed, which was claimed to be a mortgage.

It is true, as urged by the counsel for the appellee that a stranger to the judgment can not question its regularity, collaterally. It may be erroneous and voidable; but if the court had jurisdiction of the subject-matter and the person, its determination is conclusive, until reversed by an appellate court, unless the judgment was absolutely void.

Opinion of the Court.

A judgment may be impeached for fraud; and, if found tainted with fraud, must be pronounced void.

In this case, one party bases his right to relief upon a judgment, which the other party insists is fraudulent.

The fact that a debtor confesses judgment in favor of a creditor, for the express purpose of enabling a creditor to redeem, will not invalidate, if there be no fraud in the consideration. It is the policy of the law to encourage redemptions. *Karnes v. Lloyd*, 52 Ill. 114.

But a very different question is presented when the note, which is the foundation of the judgment, is without any consideration, and when it is apparent that the parties acted in bad faith, and colluded to accomplish an object in violation of right and of the law.

The policy of the law, in the encouragement of redemption, is to enable the debtor to discharge his liabilities. If there is no relation of debtor and creditor in fact, then a plan concocted to effect a redemption is a fraud. In the case of *Phillips v. Demoss*, 14 Ill. 410, this court said that it was the policy of the law for the debtor to confess a judgment for an honest debt; but if the judgment, under which the redemption was made, had been confessed when no debt in fact existed, the case would be widely different.

In the case at bar there was no debt, and therefore the judgment formed no basis in equity for redemption.

From the facts presented in the record, the whole scheme was a fraud, which can receive no aid from a court of equity.

The complainant below comes before the court as a mere volunteer—as a party to a fraudulent plan, conceived and attempted to be carried out, for the purpose of forcing a redemption. He therefore has no standing in a court of equity, and can receive neither encouragement nor assistance at our hands.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

THE PEOPLE *ex rel.* CHARLES REITZ *et al.*

v.

CALVIN DEWOLF.

1. STATUTE—*constitutional mode of passage.* A bill for an act entitled "An act to increase the jurisdiction of justices of the peace and police magistrates," printed in the Session Laws of 1871, was regularly passed in the house of representatives. In the senate an amendment was adopted of matters not embraced in the title, and the bill as amended was passed by the constitutional majority on the call of the ayes and noes. The house refusing to concur in the amendment, the senate, by a vote of 23 to 16, receded from the amendment, which was all the action had on the bill by the senate. The senate consisted of 50 members, a majority of whom were necessary to the passage of a law: *Held*, that the bill never became a law.

This was a petition for a mandamus, setting forth that the relators, on Aug. 16, 1871, recovered judgment before the defendant, a justice of the peace, against Joseph Becker for \$111.92 and costs of suit, and alleging that such justice refused to issue an execution on the judgment, on the pretense that there was no law authorizing justices to render judgment in a suit for more than one hundred dollars, and praying for a mandamus to compel the defendant to issue execution on the judgment.

Mr. FRANCIS LACHNER, for the relators.

Mr. CALVIN DEWOLF, *pro se.*

Mr. JUSTICE SHELDON delivered the opinion of the Court :

The only question here arising is, whether the supposed act entitled "An act to increase the jurisdiction of justices of the peace and police magistrates," of Session Laws, 1871, purporting to increase the jurisdiction of the above named officers to \$200 in civil causes, and to have gone into force July 1, 1871, ever became a law.

It appears by the return, which is not traversed, and is to be

Opinion of the Court.

taken as true, that the bill for the act originated in the house of representatives, and was there regularly passed, and, while pending and under consideration in the senate, an amendment thereto was proposed and adopted by a *viva voce* vote, as an additional section, in the words following :

“SECTION 2. All justices of the peace, police magistrates, and constables in this State, shall, within twenty days after this act takes effect, execute office bonds conditioned as now required by law, in addition to the bonds heretofore executed by them, as such officers, in a like penal sum, and with like security, to be approved and filed as their former office bonds ; and a failure of any justice of the peace, police magistrate, or constable to execute such bonds within twenty days after this act takes effect as aforesaid, shall be deemed a resignation of his office.”

And that when said bill passed in the senate, as stated in the petition, said section was added thereto as a senate amendment.

That, afterward, on the 12th day of April, 1871, the bill, with said senate amendment added thereto, was brought before the house of representatives for consideration, and the question being, will the house concur in said senate amendment? it was decided in the negative, and so the house refused to concur. That, on the same last named day, the action of the house in refusing to concur in the senate amendment, was reported to the senate, and, on the question then being, shall the senate recede from its amendment? the following was the vote of the senate thereon : for receding from the amendment there were 23 votes, and against receding from the amendment there were 16 votes ; whereupon it was declared that the senate had receded from its amendment. This was all the action ever had by the senate upon the bill, as we understand from the case as submitted to us by the parties.

The constitution contains the following provisions : “ Each house shall keep a journal of its proceedings, which shall be published.” Art. 4, § 10.

“Bills may originate in either house, but may be altered,

Opinion of the Court.

amended, or rejected by the other, and, on the final passage of all bills, the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members elected to each house." Art. 4, § 12.

"No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Art. 4, § 13.

The whole number of senators elected to and composing the senate being 50, at least 26 of its members must concur in the final passage of a bill.

This is indispensable to its becoming a law. The vote must be taken by yeas and nays, and entered upon the journal. It must appear on the face of the journal that the bill passed by a constitutional majority; and it is competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. *Spangler v. Jacoby*, 14 Ill. 298.

It only appears in this case that a majority of the members elected to the senate concurred in the passage of the bill as amended by the senate. And it appears that there was not a concurrence of a constitutional majority of the senate in the passage of the bill in its present form, consisting of only one section, and therefore it never became a law.

It is said by the relator, that by the refusal of the house to concur in the senate amendment it never became a part of the bill, and was as if it had never existed; that no further vote of the senate was necessary in regard to it; that they had simply failed to make this amendment a part of the bill; that the bill itself they had already passed.

But it is not true that the senate had passed the bill simply, without the amendment.

It had passed the bill only as amended.

It does not follow that the bill, stripped of the amendment,

Opinion of the Court.

did receive, or would have received, the assent of the constitutional majority of the senate.

The bill which passed the house and the bill as amended were something different.

It is further urged that, had section 2 of the act regularly passed both houses, it would never have been the law, and would have been void, because it was a subject not expressed in the title of the act, and so the fact of its being passed or left out in the senate can not affect the validity of section 1.

Even assuming the position to be correct that the amendment, section 2, would have been void, for the reason urged, it does not affect this question of assent on the part of the senate.

The question is, to what did a constitutional majority of the senate give their assent?

And it was to the increase of the jurisdiction of justices of the peace as provided in section 1, coupled with a corresponding increase of their official bonds, as provided in section 2.

A constitutional majority of the senate never assented to the proposed increase of the jurisdiction of justices without the provision for the increase of their official bonds. And the validity or invalidity of such provision in no wise changes the fact as to what the senate did or did not give their assent.

Our decision is predicated solely upon the state of facts as set forth in the return in this case, without an inspection of the journal of the senate; and we pass upon the validity of the act in question no further than as affects the present application in view of the admitted facts in the case.

The application for a peremptory mandamus must be denied.

Mandamus refused.

MICHAEL STENGER

v.

SELAH SWARTWOUT.

1. *NEW TRIAL—finding as to facts.* When there is no evidence at all as to any essential element of a cause of action or defense, or the verdict is manifestly against the weight of evidence, this court will interfere and set the verdict aside and grant a new trial.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

Mr. CHARLES J. METZNER, for the appellant.

Messrs. PARKS & ANNIS, for the appellee.

Per CURIAM: This case arose in justice's court, and was brought to recover a balance alleged to be due upon a special contract and for extra work.

The principal controversy was in reference to the amount of payments made by appellant.

This issue involved questions of fact only. The evidence was conflicting.

Where as to any essential element of a cause of action or defense there is no evidence at all, or the verdict is manifestly against the weight of evidence, this court will interfere and set it aside.

There is no essential element of appellee's case wholly unsupported by the evidence, nor was the verdict so manifestly against the weight of evidence, in respect to the alleged payments made by appellant, as to bring the case within the established rules of this court regarding new trials.

The judgment of the court below must, therefore, be affirmed.

Judgment affirmed.

Syllabus.

ELDRIDGE WHITE *et al.*

v.

EDWARD M. FISHER *et al.*

1. *MORTGAGE—priority of payment of series of notes—lost by re-issue.* Where the mortgagor paid to the payees of a series of promissory notes given by the firm of which he was a member, those which had matured, with money which his brother had assisted him to raise by the loan of certain other notes under an agreement with the brother, unknown to the payees, that the brother was to have the notes when taken up assigned to him as a security for the notes he had parted with, and the payees, at the request of the mortgagor, indorsed in blank the notes so paid them without any knowledge that they were to be re-issued by the mortgagor, and they were transferred to the brother as agreed: *Held*, on bill by the payees to foreclose the mortgage as to the remaining notes of the series, falling due in one and two years after those which had been taken up and re-issued, that the latter were not entitled to priority, but were postponed.

2. *SAME—notes re-issued after payment.* Where one of the makers of a series of notes maturing in one, two, and three years, secured by his mortgage, paid the first of the series after due, taking a blank indorsement of them, and then transferred them to a brother, who furnished the means with which they were paid, the payees not knowing that their indorsement was procured for such purpose: *Held*, that the brother, as the holder of such notes, was entitled to the benefit of the mortgage security as against the mortgagor, but as to the holders of the remaining notes his rights were postponed.

3. *PAYMENT—indorsing note on payment.* Where the makers of a series of notes procured from a third party the means with which to pay the notes then due, under an agreement that the same, when paid, should be transferred to such third party, and the payees on payment, at the request of the makers, indorsed such notes in blank and surrendered them to the makers, by whom they were delivered to the third party, the payees not knowing that they were to be re-issued: *Held*, that so far as the payees were concerned, this was not a transfer of the notes, but simply a payment.

4. In such a case the transaction could not be treated as a purchase by the makers for the third party, except on satisfactory proof that the fullest explanation was made to the holders of the notes, and that they understood it to be a sale to some third party.

APPEAL from the Circuit Court of Bureau County.

The opinion states the facts of the case.

Opinion of the Court.

Messrs. FARWELL & WARREN, for the appellants.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

In this case the appellants held certain notes, executed by the firm of Fisher, Brother & Co., maturing in one, two, and three years from date, each appellant holding different notes, but all secured by one mortgage, which was given by Edward M. Fisher, the senior member of the firm. When the notes, due at the end of the first year matured, they were taken up by Edward M. Fisher, and at his request the payees, when they surrendered the notes, placed their names on the back. Shortly prior to this time, J. M. Fisher had assisted the firm of Fisher, Bros. & Co., of which he was not a member, in procuring a loan, by allowing them the use of certain notes belonging to him, under an agreement that a part of the money thus raised, was to be used in saving the credit of the firm by taking up these notes; but the notes, when taken up, were to be assigned to J. M. Fisher, to be held by him as a security, in place of those which he had allowed the firm to pledge. Soon after the notes were taken up the firm failed in business. After the notes maturing at the end of two and three years had become due, the appellants filed their bill to foreclose the mortgage, making J. M. Fisher a party, to whom, with one Tetner, the firm of Fisher, Bro. & Co. had made an assignment of all their property. J. M. Fisher answered, claiming to own in his own right the notes maturing at the end of the first year, and alleging that they had not been paid by Edward M. Fisher, but merely bought for respondent's benefit, and that they were still held by him, and entitled to a priority of payment out of the proceeds of the mortgage. The circuit court so held, and this is the question presented by this record.

We have no brief from appellee, but after a careful examination of the evidence, we are of opinion that the appellants, when they indorsed these notes, did so without any idea that

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they were making an assignment of them to any person. They supposed the notes were paid, and placed their names upon them, merely because they were requested to do so by E. M. Fisher, and without any reason to suppose he was intending to issue the notes again with their indorsement. Adam Fisher, one of the defendants, and a member of the firm, was called by defendants as a witness, and he testified he was present when several of these notes were presented by the payees for payment, and E. M. Fisher told them that J. M. Fisher furnished the money "to pay the notes," and we observe all through his testimony, that when left to narrate the transaction in his own way, he speaks of it as a payment.

Although the legal effect of an assignment of negotiable paper can not be impaired by parol proof of a different verbal agreement, it is always proper to show the time of the indorsement, and the circumstances under which it was made. These facts enable the court to judge of the intent of the parties interested, and of the real meaning of the indorsement. In the present case the payees presented their overdue notes to the makers for payment, and received the money. They were undoubtedly told that J. M. Fisher had aided the firm in raising the money, or that he had furnished the money, as James Fisher testifies, but even that information would only confirm the impression that E. M. Fisher was *paying* the notes; for if the firm had borrowed the money either directly from J. M. Fisher, or by the aid of his indorsement, still, when borrowed, it became the money of the firm, and one of the partners was using it in discharge of the firm's indebtedness. When asked to place their names upon the notes, they did so unhesitatingly, having, as they testify, entire confidence in E. M. Fisher, and, probably thinking the indorsement of no consequence, or perhaps intended as a receipt, the notes being paid. The testimony shows that these persons were unfamiliar with business of this character, one of them indorsing by his mark. The assignment written over their names was without recourse, but if it had not been, it surely would not be claimed that an

Opinion of the Court. Syllabus.

assignment could have been written over their signatures, which would have imposed on them any kind or degree of responsibility.

To speak of the maker of a note purchasing it after maturity, by paying the holder the amount due would be a solecism. E. M. Fisher could make no purchase of the notes for himself or for the firm that would be any thing in substance but a payment; and, admitting that he could have bought them for his brother, we will not treat the transaction as such a purchase, except on satisfactory proof that the fullest explanation was made to the holders of the notes, and that they perfectly understood that they were not receiving payment of their past due debts, but simply selling them to the maker for the benefit of some third person. Such a transaction is so at variance with ordinary usage as to need clear proof, that the parties receiving the money understood it in that light.

As the notes, after being taken up were re-issued to J. M. Fisher by the makers, as against them he would be entitled to participate in the proceeds of the mortgage, but the notes in his hands must be postponed to those falling due at the end of the second and third years.

Decree reversed.

HENRY BOURNE

v.

JOSEPH STOUT.

1. **NEW TRIAL**—*finding as to facts*. When the evidence is conflicting, it is the province of the jury to weigh it, and give credence to such portions as they believe to be true, and reject the balance; and in such a case their finding will not be disturbed unless it is manifestly against the evidence.

2. **MALICIOUS PROSECUTION**—*probable cause*. In an action for malicious prosecution in procuring the plaintiff's arrest on a criminal charge, if it

Syllabus. Opinion of the Court.

appear that defendant had probable cause to believe that plaintiff was guilty, the defendant will not be liable.

3. In such a case it is not necessary that all the facts shall be true upon which the prosecutor acts. If he honestly believes them to be true, and they are of such a character as would induce a reasonable and prudent man to believe them to be true, then there is probable cause.

4. PROBABLE CAUSE—*question of fact, under instructions*. In a suit for malicious prosecution, the court can not rightfully say to the jury, that there is, or is not probable cause, but it is the duty of the court, when asked, to inform the jury what facts constitute, and what do not constitute, probable cause, leaving it to the jury to say whether such facts are proved.

5. INSTRUCTIONS—*repeating*. It is not error to refuse instructions when the legal propositions contained in them are embraced in others which are given.

APPEAL from the County Court of La Salle County; the Hon. CHARLES H. GILMAN, Judge, presiding.

The substance of the facts appear in the opinion of the Court.

Mr. E. C. LEWIS, & Mr. GEO. W. STIPP, for the appellant.

Mr. T. LYLE DICKEY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case for a malicious prosecution, brought by appellant in the La Salle county court against appellee. It appears that appellee placed in the hands of appellant, four head of horses for sale, together with some other personal property. There is no dispute that he sold three of them for which he accounted. But as to whether the other was sold there is a controversy. Appellee contends that it was not sold, or if it was, that appellant did not account for it, whilst appellant swears it was sold and accounted for by him. He having started to remove with his family to Kansas, appellee made complaint and procured a warrant for larceny against appellant of the colt in dispute, upon which he was

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pursued, arrested, and brought back ; and, on an examination, he was recognized for his appearance at the next term of court to answer the charge. The grand jury returned a true bill, and appellant was put on trial, and after introducing the testimony on behalf of the people, the prosecuting attorney abandoned the case, and appellant was discharged. And this suit was brought for an alleged malicious prosecution.

The case was tried by the court and a jury, and the issues were found for appellee ; a motion for a new trial was overruled, and judgment rendered on the verdict, and the case is brought to this court on appeal, and various errors are assigned.

An examination of the evidence preserved in the record, discloses the fact that it was conflicting, and it was the province of the jury to weigh it, and give credence to such portions as they believed to be true, and reject the balance. They have seen proper to believe that introduced by appellee, and we are not prepared to say that in doing so they erred. In such a conflict they must determine, and we will not disturb their finding unless it is manifestly against the evidence, and such is not the case on this record. They saw the witnesses testify, and had every opportunity to determine which was the more worthy of credit. It is no doubt true, that if appellee's evidence were left entirely out of view, there would be a clear case for recovery ; but, on the other hand, if appellant's testimony were excluded from consideration, the verdict would be manifestly right. There is no ground for setting aside the verdict because it is not supported by the testimony.

If the evidence on the part of appellee is true, then there can be no doubt, that there was probable cause to believe that appellant was guilty. In such cases it is not necessary, as this court has repeatedly held, that all the facts shall be true upon which the prosecutor acts ; but if he honestly believes them to be true, and they are of such character as would induce a reasonable and prudent man to believe them to be true, then there is probable cause. If a prosecutor were compelled, when

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sued, to prove the truth of all the facts and circumstances upon which he acted, before he could escape liability, there would be no safety in starting criminal prosecutions, except in cases where the proof was clear and irresistible. To announce such a rule would well nigh afford immunity to every species of crime. No such rule, has, so far as we are enabled to find, ever been announced. The jury have given credence to appellee's testimony, and if so, they could not do otherwise than find there was probable cause.

But some criticisms are made upon the instructions given for appellee. In the instructions given for appellant, the court clearly and correctly informs the jury what is not probable cause. And in appellee's instructions they are correctly informed what constitutes probable cause; with such instructions the jury could not be misled. Appellee's instructions in defining what constitutes probable cause, are but the reverse of appellant's, in stating what is not probable cause. Taking the instructions as a series, we can perceive no objection to them, and we think they presented the law of the case correctly and fairly to the jury. We do not understand appellee's instructions as counsel for appellant do. They insist that they leave the question of probable cause to the jury. This is not a fair criticism. The court informs the jury what facts, if proved, constitute probable cause, properly leaving it to the jury to say whether such facts are proved. It is not the duty of the court, nor can he rightfully say to the jury, that there is, or is not, probable cause in a case; but it is his duty, when asked, to inform them what facts constitute, and what do not constitute, probable cause. And the court did so in this case.

Nor do we perceive that the criticism of the instructions, that they are not applicable to the several counts of the declaration is entitled to weight. They announce correct legal propositions. And we are not able to see, from the evidence, that there was any material change of circumstances between the suing out the warrant, and the action of the grand jury, that rendered it improper for appellee to further prosecute. In fact we are at a loss to perceive how appellee could

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avoid appearing, and testifying before the grand jury. If the justice of the peace did his duty, he recognized appellee to appear and testify before that body, and indorsed his name on the recognizance as a witness; and he, no doubt, went before that body in compliance with his recognizance as in obedience to a subpoena. If he started the prosecution in good faith, and with probable cause, as the jury have found he did, we can not see how he could avoid appearing before the grand jury and there giving his evidence, nor could he prevent them from acting upon it when given. We do not see that the instructions could have misled the jury.

Nor do we see any error in refusing to give such of appellant's instructions as the court withheld from the jury. All legal propositions they contained, which were applicable to the case, had already been given in his other instructions. This was sufficient. We are satisfied that the parties have had a fair trial, and that the evidence sustains the verdict; and the judgment of the court below is affirmed.

Judgment affirmed.

PERU BEER COMPANY

v.

FIRST NATIONAL BANK OF PERU.

In this case no question of law is decided. There was a conflict of evidence as to the fact of a sale, and the court gives its reasons for holding with the jury.

APPEAL from the Circuit Court of La Salle County; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BLANCHARD & SILVER, for the appellant.

Mr. G. S. ELDRIDGE, for the appellee.

Opinion of the Court. Syllabus.

Mr. JUSTICE BREESE delivered the opinion of the Court :

In this case the testimony is very conflicting, the witnesses for the plaintiff and for the defendant testifying directly opposite. In such a state of case we have looked to see where the probabilities lie, and we are satisfied they are on the side of the plaintiff; and this from two facts, about which there is no dispute, and must control the case. These facts are, first, selling the beer by the appellants after the alleged sale to them by appellee, and exercising control over it by drawing it out from the casks and mixing new beer with it to improve its condition; and, second, passing a resolution appointing Throne an agent, to proceed west to make sales of the beer.

The jury must have considered these as controlling circumstances in favor of the appellee, and we can not say they are not such circumstances as should have weighed heavily in favor of the finding.

As to the instructions, we think the court properly disposed of them, and perceiving no error in the record we must affirm the judgment.

Judgment affirmed.

JACOB C. RINER

v.

DARIUS TOUSLEE.

1. CHANCERY PRACTICE—*referring to master*. On bill for taking an account between partners where the accounts are complex and intricate, the matter should always be referred to a master, to be examined and reported, in order to a final decree; and where the parties, by stipulation to save expense, seek to impose the labor of the master upon the court, this court will not examine intricate and complicated accounts on appeal, but will affirm the decree of the court below.

2. If the complainant in this class of cases should procure an *ex parte* order for a hearing without a reference, this court would reverse the decree below for want of a reference to the master.

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Opinion of the Court.

APPEAL from the Circuit Court of Knox County ; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. CRAIG & HARVEY, for the appellant.

Messrs. HANNAMAN & KRETZINGER, for the appellee.

Mr. JUSTICE McALLISTER delivered the opinion of the Court :

This was a bill in equity in the Knox County Circuit Court, filed by Touslee against Riner, setting up a partnership, the existence of divers matters of partnership accounts in difference between them, and praying that an account be taken and the balance alleged to be due the complainant be decreed in his favor. To this bill Riner put in an answer, to which replication was filed. After the cause was at issue, the parties, by their solicitors, filed a stipulation, whereby they agreed that the cause was to be tried before the court in vacation, and on such trial the court might hear and consider all proof that might be offered by defendant as to any and all indebtedness due from complainant to defendant, and also all proof offered by complainant as to any indebtedness from defendant to complainant; and if it shall appear, upon a hearing of the cause, that complainant is indebted to defendant, then a decree shall be entered for defendant for any and all sums due him; and in case there shall be found a balance due the complainant, then a decree shall be rendered in his favor for such amount.

The court heard the cause in pursuance of the stipulation, and finding the sum of \$524.86 to be due from the defendant to the complainant, the court decreed the payment of that sum.

Upon the trial several witnesses were examined, and the accounts are evidently complex and intricate. Such accounts are unfit subjects for examination in court, and ought always to be referred to a master to be examined by him and reported, in order to a final decree. The parties can then take

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exceptions before the master and to the report, and thus bring any question they may think proper before the court. Counsel can not be permitted, by their stipulations, and perhaps to save the expense of going before the master, to thus impose the labor and duties of a master in chancery upon this court. We will not examine intricate, complicated accounts brought up in this way. If the complainant below had, *ex parte*, obtained the order of the court setting the case for hearing without a reference, we should follow the authority of the case of *Dubourg v. United States*, 7 Peters, 625, and reverse the decree below for want of a reference to the master. But inasmuch as appellant stipulated for the submission of it without a reference, we shall simply affirm the decree.

Decree affirmed.

THE CHICAGO, DANVILLE & VINCENNES R. R. Co. *et al.*

v.

FREDERICK SMITH.

1. **CONSTITUTIONAL LAW—general rule.** The question of the repugnancy of a law to the constitution is one of great delicacy; and the judiciary, in justice to the rights of a co-ordinate department of the State government, ought not, and will not, declare a law to be void, except, upon the most deliberate and mature consideration, its repugnance to the constitution is clearly manifest to the understanding.

2. **SAME.** The judicial department being created under the constitution to construe and administer the law, has nothing to do with the policy or expediency of an act of the legislature. The mere fact that an act may be mischievous in its effects, burdensome upon the people, in conflict with our conceptions of natural right, abstract justice, or pure morality, or of doubtful propriety, will not justify the courts in holding it to be beyond the scope of legislative authority.

3. **TAXATION—corporate authorities.** Town officers, under the township system, making an appropriation to a railroad company, in pursuance of law, upon the vote of a majority of the legal voters of the town authorizing the same, are "corporate authorities" of a municipal corporation, who are authorized to levy taxes under the constitution of 1848.

62	268
133	576
62	268
146	465
62	268
155	465
62	268
208	66

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4. *TAXATION—corporate purpose.* A tax or appropriation for a corporate purpose is one for the benefit of the inhabitants of the municipality. Taxes levied by township authorities to aid in the construction of a railroad is a corporate purpose; and, in this respect, the distinction between a donation in aid of a railroad and a subscription to the capital stock of the corporation, is more shadowy than real. The power is granted in consideration of the public benefits, and these are as great in one case as in the other.

5. *SAME—railroads whether private or public.* If it were true that railroad corporations are strictly private, that the benefits resulting to the public from the construction of railroads are purely incidental, and that the profits arising from their operation merely enrich the individuals composing the private corporation, it might logically follow that all laws imposing taxes to aid in the building of railroads to be owned and operated by such corporations are unconstitutional, because appropriating taxes to a private and not a public purpose.

6. *TAXATION—for a railroad is a public purpose.* This court has decided that railroad corporations are created for the public good; to increase the facilities and conveniences and promote the great ends of commerce; and that they can not organize monopolies, or make contracts injurious to the public interests. The courts for many years past have recognized railroads as public improvements, made to subserve the public interests. When it is also considered that the legislature and the courts have uniformly held that they are of such public use as to justify the exercise of the right of eminent domain, the position is thereby much strengthened that taxation for such an enterprise is for a public purpose, although the distinction between the right of eminent domain and taxation is manifest.

7. *SAME.* In view of the past history of railroads; the impossibility of dispensing with them; the necessity for an increase in their number, to open more outlets for the products of our fertile and inexhaustible soil—facts all well known to the legislature—this court must hold that, even if the appropriation of taxes in this case was not for a public purpose in the broadest sense, the character of the purpose is involved in such doubt that it can not declare the action of the legislature void.

8. *CONSTITUTIONAL LAW—legislative power.* In the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge; and if there be grave doubt as to the nature of the purpose, that doubt must be solved in favor of the action of the legislature.

WRIT OF ERROR to the Circuit Court of Will County;
the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. E. WALKER, for the plaintiff in error.

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Mr. G. D. A. PARKS & Mr. CHAS. A. HILL, for the defendant in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Defendant in error filed his bill in the Circuit Court to enjoin the collection of taxes levied under an act of the legislature and in pursuance of a vote of the people, to aid in the construction of a railroad.

The act authorized all towns acting under the township organization law, to appropriate such sums of money as they should deem proper to aid in the construction of the road, to be paid as soon as the track should have been located and constructed through the towns.

The road was completed before the appropriation was made; and it was a donation to the company, and not a subscription to its capital stock.

Upon the hearing the Circuit Court made the injunction perpetual, and pronounced the act unconstitutional.

The officers of the town, who made the appropriation and levied the tax, were the "corporate authorities" of a municipal corporation; and they acted in the premises, after a majority of the legal voters of the municipality had authorized the appropriation, upon the condition of the prior construction of the road.

The only question is as to the power of the legislature to authorize municipalities to subscribe to the capital stock of railroad companies, and to appropriate money, as a donation, to aid in the construction of the roads.

The only difference between this case and numerous cases decided by this court is, that the money appropriated by virtue of the statute in question is a donation instead of a subscription.

But for this difference we might stand securely upon the maxim: *Stare decisis et non quieta movere*. Frequent fluctuations, in the opinions of courts of last resort, involve the

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court in absurdities; render the law uncertain; destroy that feeling of reliance so essential to the strength and stability of all authority, and produce mischiefs innumerable. The decisions of courts had better be involved in some error, than subject to change upon every change of the judiciary.

In the discussion of legislative power, we have nothing to do with questions of policy or expediency. The constitution has created the legislative and judicial departments; the one to make the law, the other to construe and administer it. It may be mischievous in the effects, burdensome upon the people, conflict with our conceptions of natural right, abstract justice, or pure morality, and of doubtful propriety in numerous respects; and yet we would not be justified to hold, that it was not within the scope of legislative authority for such reasons.

The question as to the repugnancy of a law to the constitution is always one of much delicacy, and courts will never indulge the supposition, unless the repugnancy is manifest to the understanding.

In *Lane v. Dorman*, 3 Scam. 238, this court said: "The determining of a question involving the inquiry whether an exercise of power, by the legislative department of the State, is constitutional, is readily conceded, not only to be a matter of delicacy, but of grave import, and demands the most deliberate and mature consideration. It should not, however, be decided but in cases of clear necessity, and where the character of the act done is in plain and obvious conflict with the constitution."

The law should not be pronounced void in a doubtful case, or upon slight implication. "The opposition between it and the constitution must be clear and strong." *People v. Marshall*, 1 Gilm. 672.

The infringement of the constitution must be evident before the courts will interpose and hold the act nugatory. *People v. Hatch*, 33 Ill. 130.

In *Ex parte M'Collum*, 1 Cow. 504, Savage, Ch. J. said that

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a court ought not to declare a law unconstitutional, unless a case is presented in which there can be no rational doubt.

In delivering the opinion in the case of *Fletcher v. Peck*, 6 Cranch, 87, Ch. J. Marshall said: "The question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by a duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In the same court, whose decision is chiefly relied on to induce a reversal of the former opinions of this court, equally explicit language, in regard to the duty of courts, has been used.

In *Twitchell v. Blodgett*, 13 Mich. 152, Cooley, J. said: "It is conceded to be the settled doctrine of this State, that every enactment of the State legislature is presumed to be constitutional and valid; that before we can pronounce it otherwise, we must be able to point out the precise clause in the constitution which it violates, and that the conflict between the two must be clear, or free from reasonable doubt, since it is only from constitutional provisions, limiting the legislative power and controlling the legislative will, that we derive authority to declare void any legislative enactment."

We might multiply extracts from the opinions of the ablest courts to the same effect. Enough has been cited to show the firm position of the judiciary, that the courts ought not, and, in justice to the rights of a co-ordinate department of the State government, can not, declare a law to be void, without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity.

An objection to this law is urged, which has been made

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since the origin of the character of legislation now under consideration.

It is assumed that the taxes levied are to be appropriated to a private and not a public purpose; that the benefits, resulting to the public—the people at large—from the construction of railroads, are merely incidental; that the profits, arising from their operation, enrich the individuals who form the private corporation; and, therefore, all laws imposing taxes to aid in the building of railroads, to be owned and operated by private corporations, are unconstitutional.

If the premises are correct, that the corporations are strictly private, and the benefits to the public purely incidental, the conclusion might logically follow. The argument assumes, as unquestionable, the point to be determined; as true, the fact to be ascertained.

In the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, can not arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the legislature.

Concede that taxation for a mere private enterprise is wrong and invalid, is the construction of the road to which the aid is proposed to be given of that character?

It is a road from Lake Michigan to a point opposite Vincennes, in the State of Indiana, traversing nearly the entire length of the State. The road was completed before the payment of any money was asked, though it was built upon the faith of it.

Are the advantages which accrue to the public from the construction and operation of railroads merely incidental in the sense of the term as commonly used? We are inclined

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to think that they rather resemble the incident in law, and appertain to, and follow, the principal thing. The benefits resulting to the people of the State, from our system of railroads are untold and incalculable. The mind can scarcely grasp them. Railroads have almost superseded all other means of inter-communication between the several parts of our extensive and growing State. They have become an absolute necessity, indispensable to our increased growth, and to the removal of our immense surplus. They have added millions to our taxable property; given augmented facilities to every department of trade; enriched the mass of the people; largely enhanced the value of our lands; built up manufactures; and brought us into close proximity with the best markets of the country. All share in the blessings flowing from them.

Railroads are, in truth, the people's highways for pleasure, and business, and commerce. Without them our internal trade would languish and die; and our corn and wheat rot in our granaries.

For more than a quarter of a century the courts have recognized and referred to them as public improvements, made for the public good, and to subserve the public interests. *Johnson v. The County of Stark*, 24 Ill. 75; *Cin., Wil. & Zanesville R. R. Co. v. The Commissioners*, 21 Ohio, (1 *McCook*) 77; *Sharpless v. The Mayor, etc.*, 21 Penn. (9 *Harris*), 149; *Nichol v. Mayor & Aldermen*, 9 Humph. 252; *Goddin v. Crump*, 8 Leigh, 120; *Enfield Toll Bridge Co. v. Hart & N. H. R. R. Co.*, 17 Conn. 40; *Beckman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, 45; *Bloodgood v. Mohawk & H. R. R. R. Co.*, 18 Wend. 9; *Newbury Turnpike Co. v. Eastern R. R. Co.*, 23 Pick. 326.

The courts, while ready and willing to protect these corporations in all their rights, have uniformly asserted, and seem determined to maintain their obligations to the public. The principles of the common law, and their charters accepted by them, and which clothe them with a portion of the sovereignty of the State, impose duties upon them to the public, which

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they must discharge. They can be compelled, by the mandates of the courts, to a full performance of them; and parties seeking redress need not resort to the imperfect action at common law, but may apply for the more effectual remedy by *mandamus*.

Railways are improved public highways; and the courts have uniformly held that they are of such public use as to justify the exercise of the right of eminent domain, in taking all real estate that may be necessary for the construction and maintenance of the road, its depots, side tracks, stations, machine shops, and other necessary appendages, disfiguring and rendering unfit for cultivation farms, and even in destroying dwellings.

The necessity and expediency for the exercise of this right, in making public improvements, either for the benefit of all the people of the State, or of a particular municipality, must be determined by the legislature.

Mere convenience is not sufficient to justify the exercise of the right. The public use must be necessary and pressing. In referring to the urgency of the public use, Woodbury, J., in the case of *West River Bridge Co. v. Dix*, 6 How. 546, said: "So as to a road, if really demanded in particular forms and places, to accommodate a growing and changing community, and to keep up with the wants and improvements of the age—such as its pressing demands for easier and social intercourse—quicker political communication, or better internal trade—and advancing with the public necessities from blazed trees to bridle paths, and thence to wheel-roads, turn-pikes, and railroads."

Though the distinction between the right of eminent domain and the power of taxation may be manifest, yet, when the public use, necessary for the exercise of the former, has been settled by both the legislative and judicial departments, and a particular enterprize has thus been fixed as of public importance, the position is very much strengthened, that taxation for such an enterprize is for a public purpose.

This court has decided that such corporations are created

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for the public good; to increase the facilities and conveniences, and promote the great ends of commerce; and that they can not organize monopolies, and make contracts injurious to the public interests. *Vincent v. C. & A. R. R. Co.*, 49 Ill. 33; *Chi. & N. W. R. R. Co. v. The People ex rel. Hempstead*, 56 id. 365.

In view of the past history of railroads, the impossibility of dispensing with them, the necessity of an increase of the number to open new outlets for the products of our fertile and inexhaustible soil—all of which were well known to the legislature—and sustained by numerous authorities—we must hold, that, even if the appropriation in this case was not for a public purpose in the broadest sense, the character of the purpose is involved in such doubt that we can not declare void the action of the legislature.

Is the law, under consideration, in violation of the fifth section of the ninth article of the constitution of 1848? That section provides that "The corporate authorities of counties, townships, school-districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It is contended that the appropriation was not for a "corporate purpose." If it was for a public purpose—for the benefit of the inhabitants of the municipality—then it would be for a corporate purpose. The latter can not be distinguished from the former; and all that we have said in relation to the public purpose of the tax, will apply with equal force to a corporate purpose. We refer to the following cases, in which the questions discussed have been settled by this court. *Prettyman v. The Supervisors of Tazewell County*, 19 Ill. 406; *Johnson v. The County of Stark*, *supra*; *Perkins v. Lewis*, 24 Ill. 208; *Butler v. Dunham*, 27 Ill. 474; *The President and Trustees v. Frick*, 34 Ill. 405.

In the case of *Nichol v. The Mayor and Aldermen*, *supra*, a subscription by the city of Nashville to a railroad was held

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to be for a corporate purpose. The constitution of Tennessee provides that "The general assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively." The language is substantially the same as in our constitution. The city of Nashville having subscribed, a bill was filed to restrain the issue of bonds; and the court decided that the legislature had power to authorize the subscription; that the construction of the road was a corporate purpose; and that the city might either levy the tax or issue bonds to obtain the money.

In *Taylor v. Thompson*, 42 Ill. 9, this court defined a corporate purpose to mean: "A tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it."

We accept this definition, and are of opinion that no person can doubt but that taxes, expended to aid in the construction of a railroad, must promote the general prosperity.

The remaining question is, whether a distinction exists between a donation in aid of the road, and a subscription to the capital stock of the corporation? The distinction is more apparent than real; indeed, to our view, is entirely shadowy.

No principle would justify the authority to a municipal corporation to become a stockholder in a railroad company, merely to acquire equitable rights, and to prevent the misapplication of the funds.

The power is granted in consideration of the public benefits, and these are as great in the one case as in the other.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

BARRETT CLARK

v.

WILLIAM LAUGHLIN.

1. CHANCERY—*error in master's report.* Where a party to a suit in chancery fails to except to the master's report of the sum due him, he will be precluding from objecting in this court that there was a greater sum due him than was allowed.

2. REDEMPTION FROM MORTGAGE—*tax title.* Where a party made a mortgage of land by a deed absolute on its face, and the mortgagee gave a bond obligating himself to convey back the premises on payment of the debt, free from all incumbrance, by deed with full covenants of warranty, and afterward acquired a tax title to the premises, the court, on bill to redeem, allowed the mortgagee the sum advanced for the tax title, and required him to convey the whole title, which the mortgagee assigned for error: *Held*, that under the terms of his bond there was no error.

APPEAL from the Circuit Court of Will County; the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. R. E. BARBER, for the appellant.

Mr. H. B. GODARD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity brought by Laughlin, the appellee, to redeem from a deed of mortgage.

The conveyance was, in form, a warranty deed given by Laughlin and wife to Clark, the appellant, with a bond for reconveyance by the latter, and is recognized by both parties as a mortgage. The court below so found, and ordered a reference to the master to compute the amount due to Clark, and, upon the coming in of the master's report, rendered a decree against Laughlin for the sum reported by the master to be due from him.

The first point of error which the appellant urges is, that

Opinion of the Court. Syllabus.

there was a greater amount due to him than that reported by the master; as to which it will suffice to say that no exceptions were taken to the master's report in the court below, and it can not be questioned for the first time in this court. *Reigard v. McNeil*, 38 Ill. 401.

The land had been sold at a tax sale, for the taxes of 1860, and purchased by one Peaselee, who assigned the certificate of purchase to Clark, who obtained from the sheriff a tax deed; and it is urged as another ground of error that the tax title was disallowed by the court as being a valid paramount one in Clark, and he was allowed a credit for the amount he advanced for its purchase.

Without considering the question as to whether a mortgagee can buy in an outstanding title and hold it against the mortgagor, Clark had here given a bond for the recoveyance of the land, free from all incumbrances, with full covenants of warranty.

Under the conditions of his bond he was required to transfer this title to Laughlin upon payment of the mortgage debt, and he must be taken to have acquired it for that purpose, or to extinguish it for the benefit of Laughlin.

Laughlin, it seems, had made a parol agreement to pay the taxes, which was no more than his duty as mortgagor required him to do; but the only effect of his failure to do so was to give Clark the right to be reimbursed what he paid to obtain the tax title. This the decree allowed.

Finding no error in the record, the decree is affirmed.

Decree affirmed

JOHN KELLY *et al.*

v.

CITY OF CHICAGO *et al.*

1 BOARD OF PUBLIC WORKS OF CHICAGO—awarding contract on buildings. 62 279
By the charter of the city of Chicago the board of public works was made a 114a 312

62	279
42a	68
62	279
160	662
62	279
58a	309
62	279
163	288
62	279
78a	589
62	279
82a	92

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distinct branch of the city government, having charge and superintendence of all the public improvements of the city, and all contracts were required to be awarded by said board "to the lowest reliable and responsible bidder or bidders." The board advertised for sealed proposals for the construction of a new "lake tunnel" of the estimated cost of \$400,000, reserving the right to reject any bid for certain causes. The contract was awarded to Steel & McMahon, who were not the lowest bidders. The complainants, whose bid was about \$4,000 less, filed their bill in equity to restrain the board and Steel & McMahon from entering into the performance of the contract, and to compel the board to award the contract to complainants, also claiming that, as tax payers, they were entitled to demand the letting of the work to the lowest bidder. The court below dismissed the bill: *Held*, that the decree was right; and that, so far as the bill sought to have the contract awarded to complainants, it was in the nature of a mandamus, and would not lie, as the board was invested with a discretion which, in the absence of fraud, the courts would not seek to control; that the complainants had no clear legal right to the relief sought; and that the claim of injury as a tax payer was equally inadmissible as a ground for maintaining the bill.

APPEAL from the Circuit Court of Cook County.

Mr. M. W. FULLER, for the appellants.

Mr. M. F. TULEY, for the city of Chicago and the commissioners.

Mr. H. S. MONROE, for Steel & McMahon.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The board of public works of the city of Chicago, on the 24th day of November, 1870, advertised for sealed proposals for the construction of a new "lake tunnel" of the estimated cost of \$400,000, the advertisement containing the following clause:

"The board reserve the right to reject any bid not in accordance with the conditions of this advertisement, or to reject all bids; and no proposal will be accepted unless in due form, and unless the party offering it shall give evidence satisfactory to the board that he has the necessary skill, experience, energy,

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and ability for doing the work ; is trustworthy, and has sufficient pecuniary resources."

The charter of the city has the following provision :

" All contracts shall be awarded by said board to the lowest reliable and responsible bidder or bidders who shall have complied with the above requisition, and who will sufficiently guarantee, to the satisfaction of said board, the performance of said work, under the superintendence and to the satisfaction of said board ; *Provided*, That the contract price does not exceed the estimate or such other sum as shall be satisfactory to said board ; copies of which contracts shall be filed in the office of the comptroller of said city."

In response to the advertisement several parties made proposals for the work ; among the bids the two following were the lowest : John McBean & Co., \$880,896 ; John Kelly & Co., \$336,648. There was a bid of Steel & McMahon for \$340,866. John McBean & Co. refused to take the contract. The board of public works awarded the contract to Steel & McMahon.

This bill in equity was filed by Kelly & Co. to restrain the board of public works and Steel & McMahon from entering into and performing the contract for doing this work, and to compel the board to award the contract to Kelly & Co., on the ground that they were the lowest reliable and responsible bidders ; and also that, as tax payers, they are entitled to demand that the contract be awarded to the lowest bidder.

The bill, so far as it seeks affirmative relief by having the contract awarded to complainants, is in the nature of a mandamus, and should be governed by principles applicable to that form of remedy.

And it is well settled that, whenever the act sought to have done requires the exercise of discretion, this remedy will not lie. There must be a clear legal right to the thing sought. *The People v. The Contracting Board*, 27 N. Y. 378 ; *Wilson*

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v. *The Mayor, etc.*, 1 Denio 595; *Hull v. Supervisors, etc.*, 19 J. R. 259; *The People v. The Canal Board*, 13 Barb. 432; *The People v. The Mayor, etc.*, 25 Wend. 680.

The complainants have merely submitted a proposal to make a certain contract with the board; how do they found upon that a right to have the board make the contract with them?

The notice for proposals expressly reserved the right to reject any bid.

The charter did not make it the absolute duty of the board to let the contract to the lowest bidder; it provides that "all contracts shall be awarded by said board to the lowest reliable and responsible bidder."

These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make a case of duty on the part of the board to award the contract to them.

It was for the board to determine whether the complainants were reliable and responsible; it exercised its judgment upon the question, and found they were not so; and for that reason awarded the contract to another bidder.

This board of public works is a distinct branch of the city government, and the most responsible duties devolve upon it.

It has the special charge and superintendence of all the public improvements of the city.

It is the fit tribunal to pass upon the qualifications of contractors—and evidently, under the charter, it is the board of public works who are to be the judges and determine upon the required qualifications of bidders, and no one else.

Should the court hear proofs and determine that these complainants were reliable and responsible, and direct the board of public works to award the contract to them, it would exercise the discretion which belongs to the board, which would be unwarranted under the well-settled principles of law, as declared in the authorities above cited, and as against it be-

Opinion of the Court. Syllabus.

ing a matter of equitable cognizance, see *Mooers v. Smedley*, 6 J. Ch. R. 27.

Nor can the court restrain the exercise of this discretion in the board by prohibiting it from entering into the contract with Steel & McMahon, in the absence of fraud, which is not shown in this case.

The claim in that respect, on the ground that complainants may suffer injury as tax payers, by an increase of taxation, to the amount of some \$4,000, the difference between the two bids, in case the contract be awarded to Steel & McMahon, instead of to the lowest bidder, is entirely inadmissible. It, too, would interfere with the exercise of official discretion. And aside from the objection of maintaining such suit, in respect to complainants' rights as tax payers merely, where their private rights are not peculiarly affected, and the only concern they have in the question belongs to them only as members of the community, (*Doolittle v. Supervisors of Broome County*, 18 N. Y. 155; *Miller v. Grundy*, 13 Mich. 540) we could not look with favor upon a complaint of that amount of added taxation, caused for the purpose of securing honest and competent contractors, in a work of such character and magnitude, where an act of incompetency or unfaithfulness in the performance of the contract might easily bring upon the city losses which, in comparison, would dwarf the sum complained of into insignificance.

The decree of the court below dismissing the bill is affirmed.

Decree affirmed.

CITY OF CHICAGO

v.

HENRY HABAR *et al*

1. SPECIAL ASSESSMENTS IN CHICAGO—*description of property in the ordinance—whether sufficient.* Upon the application of the collector of the city of Chicago for judgment upon a special assessment warrant, it was objected

Syllabus. Statement of the case.

that the ordinance condemning the land did not contain a sufficient general description of the property. The land was described as "lot 8 and the north ten feet of lot 9 in block 93 of Elston's addition to Chicago, in accordance with the plan hereto annexed." The north line of lot 9 did not run due east and west, but in such a manner as to form an obtuse angle at its center, and the portion of lot 9 sought to be condemned, as shown by the plan attached to the ordinance, was indicated by running a line parallel with the north line of the lot, and at a distance of ten feet from it. The description in the ordinance was held sufficient.

2. *SAME—power of the collector to apply for judgment.* But a recovery could not be had for the reason that the authority of the collector to apply for judgment had been abrogated by the constitution of 1870.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an application by the collector of the city of Chicago for judgment upon a special assessment warrant, the assessment being for extending or opening West Oak Street from Larrabee to Crosby Street, and the ordinance describing the land condemned as "Lot 8 and the north 10 feet of lot 9 in block 93 of Elston's addition to Chicago, in accordance with the plan hereto annexed." It appeared that the north line of lot 9 did not run due east and west, but in a north-east direction half the distance of the north line, and then in a south-east direction to the east line, thus forming at the center of the north line an obtuse angle. The portion of lot 9 sought to be condemned was represented on the plan accompanying the ordinance by drawing a line the whole length of the lot ten feet from the north line, and parallel with it. It was objected as a defense to a recovery of a judgment for the assessment against lot 9 that the ordinance did not contain a sufficient general description of the property, the objector contending that the portion to be condemned as represented by the plan did not indicate the part of the lot embraced in the description, "the north ten feet of lot 9."

The court rendered judgment in favor of the objector, from which the city appeals.

MR. M. F. TULEY, for the appellant.

Per CURIAM: We think the ordinance contained a sufficient general description of the land sought to be condemned. But as the city was not entitled to judgment upon an application made by the collector of Chicago, the judgment of the court below must be affirmed.

Judgment affirmed.

MILTON JEROME

v.

THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENTS—*necessity of a proper objection, to admit evidence.* In an application for a judgment upon a special assessment in the city of Chicago, the objector offered to prove that no notice had been given of the application for confirmation of the assessment, as required by the city charter: *Held*, as no such objection had been filed, the evidence was properly excluded.

2. SAME—*discretion as to filing objection at the hearing.* And upon objection that the court below erred in refusing to allow such objection to be filed on the hearing, it was *held*, that that was a matter resting in the discretion of the court, and as there was no affidavit upon which the application to file it was based, this court could not say that the discretion had been abused.

WRIT OF ERROR to the Superior Court of Chicago.

Mr. EDWARD ROBY, for the plaintiff in error.

Mr. M. F. TULEY, for the defendant in error.

Per CURIAM: This was an application to the Superior Court of Chicago, at the March term, 1870, for judgment upon the city collector's report of a special assessment warrant for curbing, with curb walls, West Monroe Street, in the city of Chicago.

The only question arising upon the bill of exceptions, is the

Opinion of the Court. Syllabus.

exclusion of evidence offered by the objector, that no notice was given of the application for confirmation by the common council. There was no such objection filed, and the evidence was properly excluded.

But it is also insisted that the court erred in refusing to allow the objector to file such objection upon the hearing. That was discretionary with the court, and as there was no affidavit upon which the application was based, we can not say that the discretion was abused.

The description of the improvement in the collector's report and notice, contains the words "excepting such portions of the above described work which have already been done in a suitable manner." If the ordinance had been introduced, and it had appeared by it that the work was described in that manner, and the ordinance did not define the work which had been done in a suitable manner, the case would have fallen within that of *Foss v. Chicago*, 56 Ill. 354. But inasmuch as the ordinance was not introduced, we can not say that the portion of the work assumed to have been already done in a suitable manner, was not described.

No error being apparent upon the record, the judgment of the court below must be affirmed.

Judgment affirmed.

62	286
144	392

M. O. WALKER

v.

THE CITY OF CHICAGO.

1. SPECIAL ASSESSMENTS in the city of Chicago—by whom to be determined—validity of an ordinance in that regard. Under the law on the subject of special assessments in the city of Chicago, for public improvements, the responsibility of prescribing what improvements shall be made, and the mode, manner, and extent of them is upon the common council. An ordinance which undertakes to vest in the board of public works the discretion of determining either the mode, manner, or extent of an improvement is void.

Opinion of the Court.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This is an appeal from a judgment rendered upon a special assessment warrant.

Mr. EDWARD ROBY, for the appellant.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: The ordinance in this case is in the precise terms of that in the case of *Foss v. City of Chicago*, 56 Ill. 354, and there held void.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN D. LANKENAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* HEBER S.
REXFORD, County Treasurer, etc.,

and

CHARLES W. CASTLE

v.

SAME.*

APPEALS from the Circuit Court of Cook County; the Hon. HENRY BOOTH, Judge, presiding.

* These cases should have followed the case of *Greeley et al. v. The People of the State of Illinois*, 60 Ill. 19, but were unavoidably omitted from their proper place.

Syllabus. Opinion of the Court.

Mr. GEORGE SCOVILLE, for the appellants.

Mr. FRANCIS ADAMS, for the appellee.

Per CURIAM: The questions presented in these cases are discussed in the case of *Greeley v. The People*, decided at the present term.

Judgments affirmed.

CHARLES FOLLANSBEE

v.

THE CITY OF CHICAGO.

62 238
187 60

1. SPECIAL ASSESSMENTS IN CHICAGO—*defense to the application for judgment.* Upon the application of the city collector of Chicago for judgment upon a special assessment warrant for the opening of a certain street, sixty-six feet wide, under an objection to the recovery of the judgment, evidence was introduced showing that the same street had been opened to the width of sixty feet, with a ditch on both sides, for the period of three years before the proceedings: *Held*, that this constituted, *prima facie*, a defense.

2. SAME—*power of the collector to apply for judgment.* And besides, the collector's authority to apply for the judgment had been abrogated by the constitution of 1870.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding.

Mr. EDWARD ROBY, for the appellant.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: This is an appeal from the judgment of the Superior Court of Cook County, rendered upon the application of the collector of the city of Chicago, upon a special assessment warrant for the opening of a street sixty-six feet wide, from West Madison Street to West Twelfth Street, properly

Opinion of the Court. Syllabus.

described in the proceedings. Under an objection to the recovery of the judgment, made on behalf of appellant to that effect, evidence was introduced showing that the same street had been opened to the width of sixty feet, with a ditch on both sides, for the period of three years before these proceedings.

This evidence was given by an unimpeached witness, and stands upon the record uncontradicted. *Prima facie*, it constituted a defense. The collector was unauthorized to apply for judgment.

The judgment must be reversed and the cause remanded.

Judgment reversed.

THOMAS H. BROWN *et al.*

v.

THE CITY OF CHICAGO.*

1. SPECIAL ASSESSMENTS IN CHICAGO—*who may apply for judgment.* The authority of the city collector of Chicago to apply for judgment for the sale of real estate, for the payment of unpaid special assessments, was abrogated by the constitution of 1870.

2. SAME—*certificate of publication.* The certificate of publication of the commissioners' notice of their meeting to make a special assessment in the city of Chicago, and of the notice of application for confirmation of the assessment, is fatally defective if it omit to state the dates of the first and last papers containing such notices, or language equivalent thereto.

APPEALS from the Superior Court of Cook County.

These cases arise upon the application of the city collector of Chicago for judgments upon a special assessment warrant. The court below granted orders for the sale of the real estate

* This case and the cases of the following named appellants against the city of Chicago are all considered in the same opinion: Adams & Parker, Peter Schuttler *et al.*, and Francis S. How *et al.*

Opinion of the Court. Syllabus.

against which the assessment was made, for its payment. The objectors bring the record to this court.

Per CURIAM: These cases all arise upon one warrant, and out of the same proceedings. If we were to stop to discuss all the questions urged in these and the other assessment cases before us, the longest mortal life would not suffice to complete the task.

Two points are made, each of which is fatal to the judgment:

1st. That the collector was not authorized to apply for the judgment. *Hills v. Chicago*, 60 Ill. 86.

2d. That the certificate of publication of the notice of the meeting of commissioners to make the assessment, and of publication of notice of application for confirmation (*Rue v. The City of Chicago*, 57 Ill. 435, where the certificates were in the same form,) not showing the date of the last paper containing the same, as required by the statute.

Judgments reversed and the causes remanded.

Judgments reversed.

DANIEL SULLIVAN

v.

GEORGE L. STEPHENSON *et al.*

1. CITY ORDINANCE OF ONEIDA, to suppress the sale of liquor—validity of The charter of the city of Oneida, in Knox County, empowers the city council to declare the selling, giving away, or the keeping on hand for sale of any spirituous or intoxicating liquors, etc., within the city, a nuisance. An ordinance of said city which authorized a search of dwelling-houses, etc., and the seizure of all liquors when found in a greater quantity than one gallon, etc., whether the intention was to sell them in the city, or ship them and sell elsewhere, was held to be void.

2. SAME—replevin—whether it will lie. So, where liquors were seized by virtue of such ordinance, in was held, that an action of replevin could be maintained for their recovery.

Statement of the case.

APPEAL from the Circuit Court of Knox County.

This was an action of replevin commenced by Sullivan at the February term, 1869, of the court below, to recover five barrels of whisky, forty-two gallons to the barrel, of the value of \$500.

The declaration contained two counts. The first count alleged that the defendants took the property in question, and the second, that they detained the same.

February 15, 1870, by leave of the court the plaintiff filed an amended declaration containing two counts, the first count alleging that defendants wrongfully took said property, and the second, that they detained the same.

February 9, 1870, to the original declaration defendants filed pleas, numbered one, two, and three, to each of which pleas the plaintiff filed general and special demurrers, which pleas were afterward withdrawn.

On February 16, 1870, the defendants filed to the amended declaration the following pleas, numbered four and five:

4. And the said defendant, by Smith, Frost, and Tunnickliff, their attorneys, come and defend the wrong and injury, and say that they did not take the goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, and unlawfully take or detain the same in manner and form as the said plaintiff in his declaration has alleged against them, and of this they put themselves upon the country, etc.

5. And for a further plea in this behalf, defendants say, *actio non*, because they say that at the time, when, etc., the defendant, George L. Stephenson, was marshal of the city of Oneida, in said county of Knox, and that, on the 22d day of December, A. D., 1869, at said city of Oneida, in said county of Knox, a warrant was duly issued by one James A. Pratt, by the name and style of J. A. Pratt, then being police magistrate of said city of Oneida (having full authority to issue the warrant aforesaid, and to issue warrants and try offenses

Statement of the case.

in all cases of violation of the ordinances of said city), in pursuance of the charter of said city, created by the laws of the State of Illinois, being an act passed March 4, A. D., 1869, approved that day, of said legislature of Illinois, and ordinances of said city, and in especial pursuance of section 22d of article 5th of said charter, and in pursuance of sections one, three, four, and five of an ordinance of said city of Oneida, entitled "An ordinance regulating the sale of intoxicating liquors in the city of Oneida," which section of said charter is in substance and effect as follows:

SEC. 22. The city council shall have power to declare the selling, giving away, or the keeping on hand for sale, of any spirituous or intoxicating liquors, ale, or beer, or any kind of fermented liquors, within the said city, a nuisance, and may provide, by ordinance, for summarily abating and suppressing the same; and on information under oath that any person within the limits of said city is guilty of selling or keeping on hand for sale such liquors, or beer, or ale, the police magistrate of said city shall issue a warrant, directed to the city marshal, or any constable of the county of Knox, commanding him in the day-time to search the premises of such person or persons suspected of selling liquors or beer in violation of this section, or the ordinances passed in pursuance thereof; and in case the said marshal or constable shall find such liquor or beer in a greater quantity than one gallon, shall seize and forthwith take the same before the magistrate issuing the said warrant, to be disposed of as the city council, by ordinance, shall determine.

The possession of such intoxicating liquors, ale, or beer in a greater quantity than one gallon, by any person in said city, except druggists, shall be *prima facie* evidence of unlawful intent, and unless satisfactorily explained, shall be held sufficient evidence of selling and keeping on hand for sale, such liquors, ale, or beer, in violation of this act and the ordinance passed in pursuance thereof.

Statement of the case.

And which said sections one, three, four, and five of the aforesaid ordinance, entitled "An ordinance regulating the sale of intoxicating liquors in the city of Oneida," are in substance and effect as follows:

"An ordinance regulating the sale of intoxicating liquors in the city of Oneida."

SEC. 1. Be it ordained, by the city council of the city of Oneida, that any person who shall sell, barter, or exchange any spirituous, vinous, malt, fermented, mixed, or intoxicating liquors, strong beer, lager beer, or ale, either by himself or herself or by herself or his agent or her agent, or otherwise, within the corporation limits of the city of Oneida, and each and every person knowingly aiding or assisting therein as agent, servant, clerk, or otherwise, shall be adjudged guilty of a nuisance, and upon conviction thereof, shall be fined in any sum not less than five dollars nor more than fifty dollars for each offense.

SEC. 3. If any person shall within the city keep on hand for sale any spirituous, vinous, malt, or intoxicating liquors, ale, strong beer or lager beer, he shall be adjudged guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars.

SEC. 4. Whenever complaint on oath shall be made before the police magistrate that any person within the city has in his or her or their possession any intoxicating liquors, ale, or beer, for the purpose of sale, the police magistrate shall forthwith issue a warrant, directed to the city marshal or constable, in the daytime to search the dwelling-house, out-house, barn, shop, or shed of the person so charged with a violation of this ordinance; and if the said city marshal or constable, having said warrant to execute, should find on the premises of the person so charged any intoxicating liquor, ale, or beer in a greater quantity than one gallon, he shall seize the same, and also take into custody the person so charged with violating this ordinance, and bring him, together with such liquor, ale, or beer, before the court issuing said warrant. Thereupon the said

Statement of the case.

court shall immediately proceed to try the person so arrested, unless there should be good cause shown for delay ; and if he should not offer to said court a satisfactory explanation, and should not show to the court that such liquor, ale, or beer was upon the premises for a lawful purpose and not for sale : Then said court may hold him guilty of maintaining a nuisance within the city, and fine him in a sum not less than fifty nor more than one hundred dollars, and the said court may order that he stand committed to the jail of Knox County, or the city prison, until said fine and the costs of the proceedings are paid. The liquor, ale, or beer seized as aforesaid, may be sold as other property on execution, and the proceeds of the sale thereof applied in payment of the fines and costs of the proceedings.

SEC. 5. Whenever any person shall complain on oath before any police magistrate or justice of the peace, of the city of Oneida, that he or she has reason to believe and does believe that any person has been guilty of violating either of the foregoing sections of this ordinance, it shall be lawful for the said magistrate or justice of the peace to issue a warrant for such person or persons so charged with violating the foregoing ordinances, directed to the city marshal, or any constable of the county of Knox and the State of Illinois, commanding him forthwith to bring such person or persons before such magistrate or justice to be dealt with according to law.

Which warrant so issued by said James A. Pratt, said police magistrate of said city, was by him delivered to said defendant, George L. Stephenson, to execute, and was issued upon the complaint of Nathan Coleman, upon oath, and was directed to the marshal of said city, or any constable thereof, to execute, which complaint on oath, and said warrant are severally in substance and effect as follows :

COMPLAINT.

STATE OF ILLINOIS, }
COUNTY OF KNOX, } ss:

Nathan Coleman, of the city of Oneida, in the county of

Statement of the case.

Knox and State aforesaid, after being duly sworn, says that one Daniel Sullivan, a resident of the city of Oneida, has on hand, for the purpose of sale, within said city, a large quantity of intoxicating liquors, viz: whisky, brandy, rum, and gin, and that the said Daniel Sullivan has been guilty of selling and giving away said liquors within and during the six months last past, in violation of the charter of the said city of Oneida, and the ordinances passed by the city council of said city, in pursuance of said charter; and he prays the court that a warrant be issued by the police magistrate of said city, commanding the city marshal to search the dwelling-house of the said Sullivan and his out-houses situated thereon, in pursuance of section 22 of article 5 of the charter of said city, and that he may be dealt with as the law directs.

(signed)

N. COLEMAN.

Subscribed and sworn to before me this 22d day of December, 1869.

(signed)

J. A. PRATT, P. M.

WARRANT.

STATE OF ILLINOIS,
COUNTY OF KNOX, CITY OF ONEIDA, } ss:

The people of the State of Illinois, to the marshal of said city or any constable thereof, greeting:

Whereas, Nathan Coleman hath this day made complaint, on oath, before J. A. Pratt, a police magistrate of said city aforesaid, that one Daniel Sullivan, a resident of said city of Oneida, has on hand, for the purpose of sale within said city, a large quantity of intoxicating liquors, viz: whisky, brandy, rum, and gin, and that the said Daniel Sullivan has been guilty of selling and giving away said liquors within and during the six months last past, in violation of the charter of the said city of Oneida, and the ordinances passed by the city council of said city in pursuance of said charter.

Statement of the case.

We therefore command you, in pursuance of section 22 of article 5 of the charter of said city, that, with necessary and proper assistance, you enter, in the day time, into the said dwelling-house of the said Sullivan, and his out-houses situated on his premises, and there diligently search for the said spirituous liquors, and if any shall be found upon such search, in quantities over one gallon, that you bring the said liquors before the said police magistrate, to be disposed of according to law. Hereof fail not. In witness hereof, the said police magistrate has hereunto set his hand and seal at the city of Oneida, this 22nd day of December, 1869.

(signed) J. A. PRATT, [SEAL.]
Police Magistrate.

And in case you find on the premises of the said Sullivan intoxicating liquors, ale, or beer, in a greater quantity than one gallon, you will take into your custody the said Daniel Sullivan, and forthwith bring him before me, to be dealt with according to law.

(signed) J. A. PRATT, [L. s.]
Police Magistrate.

And said defendants say that, on said 22d day of December, A. D., 1869, at said city of Oneida, at said county of Knox, said warrant and written directions, issued under the hand and seal of said police magistrate, was by him delivered to said defendant, said George L. Stephenson, then being marshal of said city, to execute, and that by virtue of such warrant and written authority of said police magistrate, the same then and there being in full force and effect, said defendant, George L. Stephenson, as marshal of said city of Oneida, did, on said 22d day of December, A. D., 1869, at said city, and while said warrant was in full force and effect, and by virtue thereof, take the said goods and chattles in said declaration mentioned, being then and there found on the premises of said plaintiff, in said city of Oneida, and did levy upon the same, and did seize or take into custody the same, as the property of Daniel Sullivan,

Statement of the case.

by virtue of said warrant and writ aforesaid, and by virtue of said process, still remaining in full force and effect, and also arrest said Daniel Sullivan, and did bring said Daniel Sullivan and said liquors and personal property aforesaid, consisting of intoxicating liquors, before said police magistrate, to be dealt with according to law, and did lawfully hold the same by virtue of said writ and process, still remaining in full force and effect, and did lawfully hold said intoxicating liquors and personal property by virtue of said writ and process, as he lawfully might for the cause aforesaid; and while so holding said property to be dealt with according to law, and while said warrant remained in full force and effect, said plaintiff replevied the same by writ of replevin issued in this suit. Said suit aforesaid, before said police magistrate, being then and there still pending and undetermined.

Said property and liquor being the same goods and chattels in the declaration mentioned, and being subject to seizure by said defendant, George L. Stephenson, as said marshal, under the writ and authority aforesaid, said property being then the property at the time of such seizure by said defendant, said marshal, of said plaintiff and liable to such seizure, being then and there held in said city of Oneida by said plaintiff, and on his premises, for the purpose of sale of said liquor, and for the purpose charged in said complaint, on oath, upon which said warrant was issued; and said defendants further say that the defendants, Nathan Coleman and Thomas Huston, acted in the aid and at the request of said defendant, Stephenson, said marshal, in taking and detaining said property while he was acting under and by virtue of said writ and warrant in taking and detaining said property as aforesaid, as they lawfully might for the cause aforesaid, which is the same taking and unlawfully detaining, which property was the same goods and chattels, as in said declaration mentioned, and no other; and this the defendants are ready to verify, wherefore they pray judgment, etc.

To said pleas four and five, on February 17, 1870, plaintiff filed a general demurrer, which was several to each plea.

Statement of the case. Opinion of the Court.

Afterward defendants withdrew their fourth plea from the files, and the court overruled the demurrer to the fifth plea, and the plaintiff stood by his demurrer and objected and excepted to the ruling of the court.

The cause then went off the docket, and remained off until the December special term, A. D. 1870, when it was redocketed at the instance of the defendants, and a motion made by defendants to correct the record, no notice having been given to the plaintiff.

The motion was continued till the February term, 1871, when it was withdrawn, and a motion was entered for final judgment on the fifth plea, which motion the court granted, and entered judgment on said fifth plea for the defendants and against the plaintiff. The plaintiff excepted to the ruling of the court, and to reverse the judgment brings the record to this court.

Messrs. CRAIG & HARVEY, for the appellant.

Messrs. WILLOUGHBY & GRANT, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The ordinance, by virtue of which the property of appellant was seized by the officer, has been pronounced invalid in the opinion in the case of *Sullivan v. The City of Oneida*, 60 Ill. 242.

Appellant, therefore, had the right to recover in his action of replevin.

The judgment is reversed and the cause remanded.

Judgment reversed.

Syllabus. Opinion of the Court.

LUCIUS B. OTIS

v.

THE CITY OF CHICAGO,

and

LABAN S. MAJOR

v.

SAME.

1. DELINQUENT TAXES AND SPECIAL ASSESSMENTS—*who may apply for judgment therefor—constitutional law.* The authority vested in the city collector of Chicago, by virtue of the charter of the city, upon application to the court to obtain an order for the sale of real estate for the payment of delinquent city taxes and unpaid special assessments was abrogated by sec. 4 of article 9 of the constitution of 1870, which requires the legislature to provide, in all cases where necessary to sell real estate for the non-payment of taxes or assessments for State, county, municipal, or other purposes, that a return shall be made to some general officer of the county having authority to receive State and county taxes, and vests in such officer alone, upon the order or judgment of some court of record, the power to sell.

2. And, as held in *Hills v. The City of Chicago*, 60 Ill. 86, this provision of the constitution went into effect immediately upon the adoption of that instrument, its operation not awaiting the action of the legislature in designating to what general officer the returns should be made.

APPEALS from the Superior Court of Cook County.

Mr. EDWARD ROBY & Mr. JOHN BORDEN, for the appellants.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: These cases arise upon the same proceeding. It was an application by the collector of the city of Chicago, at the March term, 1871, of the Superior Court, for judgment upon a special assessment warrant, in a proceeding to widen an alley from Clark Street to La Salle Street—running east

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and west through block 117, school section addition to Chicago.

We have examined the several points made, and perceive no ground for reversal, except as to one point, viz; the want of authority in the city collector to apply for judgment. His authority in this behalf had been abrogated by the new constitution. *Hills v. Chicago*, 60 Ill. 86. The judgments must be reversed and causes remanded.

*Judgments reversed.**

WILLIAM K. REED, impleaded, etc.,

v.

ERASMUS M. MOFFATT *et al.*

1. ELISOR. Where the office of sheriff of a county was vacant, and the duties of the office was being performed by the coroner, who was a party defendant to a bill in chancery filed: *Held*, that the facts justified the clerk of the court in the appointment of an elisor to serve the summons. The statute does not require an elisor to be sworn.

2. SERVICE—*return construed*. An officer's return of service of a summons

* In conformity with this decision, the judgments of the court below are reversed in the cases of the following named appellants against the city of Chicago, all being rendered upon applications made by the city collector for orders to sell real estate for the payment of delinquent taxes and unpaid special assessments: John McGlashan, Wm. B. Snowhook, Frederick H. Winston *et al.*, Henry H. Walker, A. T. Galt, Robert T. Lincoln *et al.* Alvin Salisbury, Joseph N. Barker, J. H. Dunham *et al.*, Elizabeth W. Murray *et al.*, Timothy Wright, Barnum Blake, Augustus J. Vaass *et al.*, Pacific Hotel Co., J. Mason Parker, John C. Campbell *et al.*, Andrew Garrison, Martin Andrews, Charles A. Gregory, George W. Gerrish, Charles Follansbee, Robert Rae, Henry Potwin, Walter N. Woodruff, Jacob Harris, Clara S. Mason, Mary Ann Hogarth, Charles V. Dyer, Brainard T. Smith, Henry H. Walker, P. D. Hamilton, Bridget O'Reilly, Francis M. Griffin, Philip Larmon, Francis Larned, Henry H. Walker, George F. Harding, Walter N. Woodruff, Bernard A. Stampoffski, Walter N. Woodruff, Charles Follansbee, Phoebe B. Miller, John R. Hoxie. Francis Larned, and Bridget O'Reilly.

Syllabus. Opinion of the Court.

in chancery issued against A and B was "served by delivering a copy of the within writ to A and B, this 15th day of September, 1870:" *Held*, that it showed a service on each defendant by copy.

3. PARTIES *in chancery*. Where a bill in equity to set aside a tax deed showed that the purchaser at the sale had parted with all his interest to one of the defendants, it was held that an objection that such purchaser was not made a party defendant, was not well taken.

APPEAL from the Circuit Court of Cook County; the Hon. WILLIAM W. FARWELL, Judge, presiding.

Mr. GEORGE SCOVILLE, for the appellant.

Messrs. BLANCHARD & MILLARD and Mr. J. W. CHICKERING, for the appellees.

Per CURIAM: The decree in this cause does not appear to be questioned on the merits. The principal objection made by appellant is, that he was improperly defaulted, as he had not been served with process. The process of summons was served by an elisor, appointed by the clerk of the circuit court, in whose office the bill was filed, in pursuance of section 18 of the act respecting sheriffs and coroners (R. S. 514), the fact being that the office of sheriff was vacant, and its duties discharged by the coroner, who was a party defendant to the bill. A case had occurred justifying the appointment of an elisor by the clerk. *Beach v. Schmultz*, 20 Ill. 185. It is objected that the elisor so appointed acted by deputy. The record shows no such fact. He made his return on the summons in his own name. It is probable a printed form was used, when, if the writ is served by a deputy, a blank is left in which to insert his name.

It is further objected, that the return does not show that a copy of the writ was delivered to each of the defendants. The return is as follows: "Served by delivering a copy of the within writ to Wm. K. Reed and Benjamin L. Cleaves, this 15th day of September, 1870." A reasonable and proper construction of the meaning of this return is, that appellant

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was served by copy, and Cleaves also. *Farnsworth v. Staples*, 12 Ill. 482; *Barnes v. Hazleton*, 50 id. 429.

Another objection is that the elisor took no oath, and made no return under oath. This is not required by the statute.

As to the jurisdiction of a court of equity in a case like this, that is settled by this court in the case of *Gage v. Rohrbach* and *Gage v. Billings*, 56 Ill. 262, 268.

As to the objection that Mulvey, in whose name the land was struck off at the tax sale, was not made a party, it is sufficient to say, the bill shows he had parted with all his interest to appellant, and the officer making the sale had no interest to be protected by making him a party.

The default of appellant, he having been served with process, admitted all the material averments in the bill, and being true, the decree of the court was right, and it must be affirmed.

Decree affirmed.

62 121
121 614

A. G. WEBSTER

v.

CITY OF CHICAGO.

1. TAXATION—city taxes and assessments—who must apply for judgment. Under the fourth section of article nine of the constitution of 1870, a city collector is prohibited from making sales of real estate for the non-payment of taxes or special assessments, and, consequently, such officer is not authorized to apply for judgment. The application and sale must be made by some general officer having authority to receive State and county taxes.

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. EDWARD ROBY, for the appellant.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: At the March term of the Superior Court of

Opinion of the Court.

Cook County, in the year 1871, the collector of the city of Chicago having filed his report of unpaid taxes due upon the general tax warrant for city taxes, and given the notice required by law, application was made on behalf of the city of Chicago for judgment against the delinquent real estate mentioned in the tax list.

The court below gave judgment in favor of the city, and this case was brought here by appeal. The principal question presented in this court is, whether, in view of the fourth section of article nine of the new constitution, judgment could be rendered upon the report of the city collector, the legal effect of which is to authorize such collector to sell the real estate in question.

The fourth section of article nine is as follows: "The general assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments, for State, county, municipal, or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive State and county taxes; and there shall be no sale of the said property for any of said taxes or assessments, but by said officer, upon the order or judgment of some court of record." Upon a very careful consideration of the question, we have arrived at the conclusion that the prohibition in the last clause of the section is self-executing, and can not be distinguished from other prohibitory clauses in the same instrument. Legislation is necessary to carry the provision of the section in respect to municipal taxes or assessments into effect. But the prohibition in the last clause was clearly intended to require such legislation by stopping all sales for such taxes or assessments until the requisite legislation should be provided. The judgment of the court below must, therefore, be reversed and the cause remanded.

It may not be improper to say that several cases upon the same general tax warrant, as well also upon divers warrants for special assessments, are before us upon appeals or writs of error, involving the same question, and in which full opinions

Syllabus. Opinion of the Court.

will be prepared and filed as soon as the business of the court will permit.

Judgment reversed.

JOHN FORSYTHE

v.

CITY OF CHICAGO.

1. SPECIAL ASSESSMENT—*prior assessment in bar*. On application for judgment against certain lots to enforce collection of a special assessment for opening a street, it was urged that the ordinance under which the assessment was made, was void on account of a prior proceeding for opening the street, and making an assessment therefor, which was claimed to be valid. The lot owner did not show that a warrant had ever issued on the first assessment: *Held*, that he should have introduced the record, showing that the first assessment was in conformity with the statute; because if there was not a valid confirmation of a valid assessment, it was not conclusive upon the city.

APPEAL from the Superior Court of Chicago.

Messrs. WILLIAMS & THOMAS, for the appellant.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: The questions arising in this case are substantially the same as in the case of *Burton v. City of Chicago*, *ante* p. 179, except that it is claimed in the case at bar, that the second ordinance, which stands for the original in relation to this new assessment, was wholly void, on account of there having been, as it is alleged, a prior valid proceeding for opening the street, and making an assessment therefor. We think it should have been shown that a warrant was issued for such first assessment, or the full record should have been introduced showing that it was in conformity with the statute; for, unless there was a valid con-

Opinion of the Court. Syllabus.

firmation of a valid assessment, the proceeding could not be conclusive upon the city in this aspect of the question.

The judgment of the court below must be reversed on the ground that the collector was not authorized to apply for the judgment.

Judgment reversed.

HENRY H. HONORE

v.

CITY OF CHICAGO.*

1. SPECIAL ASSESSMENT—*notice of, necessary.* On an application for judgment in favor of the city of Chicago, by the city collector, against lands to enforce collection of a special assessment made for the purpose of widening a street, no competent proof of the notice of making the assessment appeared in the proceedings put in evidence, nor was there any extrinsic proof of such fact: *Held*, that the want of such proof was fatal to the judgment on appeal, and that the city collector, under the constitution of 1870, had no authority to apply for judgment.

APPEAL from the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

MR. EDWARD ROBY, for the appellants.

Mr. M. F. TULEY, for the appellee.

Per CURIAM: These cases arise out of the same proceeding, which was an application to the Superior Court, at its March term, 1871, by the collector of the city of Chicago, for judg-

* The cases of *Stampofski v. Chicago*, and *Stearns v. Same*, are considered in the same opinion.

Opinion of the Court. Syllabus.

ment upon a special assessment warrant, in the matter of widening Wabash Avenue, to the width of 100 feet, from Douglas Place to Egan Avenue.

The entire record of the proceedings was put in evidence, from which it appears that there was no competent proof of the notice of making the assessment, nor any proof *dehors* that record. This is fatal to the judgment under the objection made to the application. *Rich v. Chicago*, 59 Ill. 286. The collector was unauthorized to apply for judgment. *Hills v. Chicago*, 60 Ill. 86.

The judgments will be reversed and the causes remanded.

Judgments reversed.

JAMES P. DARST *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INJUNCTION—to prevent the holding of an election—contempt. A court of chancery has no jurisdiction to enjoin the holding of an election by the people, and a writ issued for that purpose is void, so that to disregard the writ will not subject a party to punishment as for a contempt of court.

WRIT OF ERROR to the Circuit Court of Woodford County ;
the Hon. S. L. RICHMOND, Judge, presiding.

This was a proceeding by attachment for contempt of court, against J. William Clark, James P. Darst, and others, in refusing to obey an injunction writ ordered by William G. Randall, master in chancery of Woodford County, Illinois, prohibiting Jefferson A. Davis, supervisor of the town of Olio, in

Statement of the case. Opinion of the Court.

Woodford County, Daniel R. Meek, assessor, Benjamin L. Moore, collector, and Frank M. Hoyt, clerk of said town, and their successors in office, and all other persons in said town from holding an election, or acting as judges of an election, on the 14th day of June, 1870, for the purpose of voting "for or against" a subscription to the capital stock of the Chicago, Pekin & Southwestern Railroad Company, to the amount of \$50,000, and from making any subscription on behalf of said town of Olio, by virtue of such election, and from issuing bonds of said township to pay said subscription.

The plaintiffs in error were fined twenty dollars each, and judgment was rendered against them for that amount and costs. To reverse this judgment they now bring the record to this court.

Messrs. WORTHINGTON & PUTERBAUGH, for the plaintiffs in error.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

Appellants were fined for contempt of court for refusing to obey a writ of injunction commanding them, as public officers, not to hold an election.

The case is identical, in the facts, with the case of *Walton et al. v. Develing et al.*, 61 Ill. 201. The principles and reasoning in that case apply to this.

The writ of injunction was void, and a party can not disobey a void writ.

The judgment is reversed and the cause remanded.

Judgment reversed.

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CASES

IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1872.

ELISHA LINDER

v.

DAVID CARPENTER.

1. **CONTRACT—against public policy.** A contract made with officers of a railroad company, acting in their individual capacity, to induce them to establish the line of the road at a given point, for the purpose of promoting the private advantage of the contracting parties, is against public policy, as tending to sacrifice the interests of stockholders and of the public, and will not be enforced in equity.

2. **RESCISSION FOR FRAUD.** On bill in chancery to set aside a conveyance of an interest in land, made by the grantor to secure the location of the line of a railroad near such land, on the ground of fraudulent representations of the grantee and others interested with him, to induce the conveyance, the court refused to decide whether, if the fraud were proved, the complainant could have relief, and affirmed a decree dismissing the bill for want of proof of the fraud.

WRIT OF ERROR to the Circuit Court of Coles County ;
the Hon. JAMES STEELE, Judge, presiding.

(309)

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190	1327
62	309
112a	1187

Opinion of the Court.

Messrs. HENRY & READ, for the plaintiff in error.

Mr. S. M. SHEPHARD, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

In November, 1853, the appellant, Linder, owning lands where the town of Mattoon now stands, and being desirous that the Terre Haute & Alton Railway, then in process of construction, should cross the Illinois Central Road at some point upon his land, and thus cause the growth of a town, executed a bond to one Messer, binding himself to convey to Messer an undivided twenty acres for the sum of fifty dollars, upon condition that the T. H. & A. R. Road should cross the Central at or near the center of the section in which the land was situated. Messer at the same time executed a declaration of trust, showing that he was to hold the land for the joint benefit of himself, Carpenter, Tuell, Hunt, and Sanderson. Messer was a contractor upon the road; Hunt, the chief engineer; Carpenter, the chief engineer for this division; and Sanderson was paymaster. In what way Tuell was connected with the road does not appear. The line was established across the land; and, in January, 1854, Linder conveyed an undivided twenty acres to Tuell, Sanderson, and Carpenter. In May, 1855, they reconveyed to Linder, in order that the entire premises in which they held an undivided twenty acres might be laid out into blocks and lots, and in July, 1855, Linder conveyed back to Carpenter certain blocks representing the twenty acres. The town of Mattoon grew up upon this and adjacent tracts. At the October term, 1865, Linder filed his bill in the circuit court against Carpenter, alleging that the above recited contract and conveyance had been obtained from him by fraud, and asking that Carpenter should be decreed to account to him for the proceeds of the lots sold, and to reconvey to him the lots unsold. On the hearing, the court dismissed the bill.

Opinion of the Court.

We had occasion, in the case of *Bestor v. Wathen*, 60 Ill. 138, to express our views of contracts of this character made between private individuals and the officers of a railway company acting in their individual capacity. We said, in the opinion in that case, that contracts like the one before us, made between the land owner and the railway officials, in order to establish the line of the road for the purpose of promoting the private advantage of the contracting parties, were against public policy, because tending to cause a sacrifice of the interests of the stockholders and of the public. In that case the land owner had refused to convey, and the railway officials filed their bill to compel a conveyance. We held the contract, one which a court of chancery would not enforce.

Our views of the character of such a contract are wholly unchanged; but this case comes before us in a different shape. Here the contract has been executed by the transfer of the title; and more than twelve years after the deed was made, the grantor comes into court and asks that it be rescinded, and the title be reinvested in himself. This is sought upon the alleged ground that the defendant and his co-officials, with whom the contract was made, falsely represented that they could control the location of the line, and threatened, unless complainant and others would convey lands to them, they would cross the Illinois Central several miles further north, when, in fact, as complainant insists, the line of the road was already established where it was subsequently built, at the time the contract was made, and these persons had no control over it. It is urged by counsel for complainant, that, although such a contract may be objectionable, the complainant is not *in pari delicto*, and, if the victim of fraudulent representations, is entitled to relief.

We do not find it necessary to determine whether, if the fraud were proven, we should be constrained to refuse the relief sought, on the ground that the complainant does not come into court with clean hands. It is enough to say that the complainant has not proved the alleged fraud. It is true, the

Opinion of the Court.

persons with whom he contracted, had no legal power to control the line of the road, and it is impossible that the complainant, who was himself a stockholder in the road, and must have known of the existence of a board of directors, should have understood their representations in that sense. They meant, and must have been understood as meaning, that practically they could determine whether the new road should cross the Central near the center of the section in which the complainant's land was situated, or a mile or two further north or south. As one of these parties was the chief engineer of the road, another the chief engineer of that division, and a third one of the contractors, we can entertain no doubt that it was in their power to exercise a most potent influence upon the exact location of the line. This would necessarily result from their official position; and Sanderson testifies that Hunt, Carpenter, and Messer, controlled its location, and he has no doubt the donation of lands at Mattoon secured the location there. We can discover no fraud in these representations.

But it is urged, that at the time the contract was made, the location was already established. This position is not sustained by the evidence. It is true, the contract to build the road had been executed; but that did not define the point for crossing the Central Road; and Sanderson swears positively that the line had not been established when the bond was signed.

It is further urged, that from the conformation of the country, the line must necessarily have crossed the Central at Mattoon, and that this fact was known to the engineers and to their fellow-purchasers. It may be true that this was the best route; but it is not proven, and probably is not true, that these parties could not have caused the adoption of a line so far variant from the one agreed upon as to defeat the views of complainant.

We see no ground for the rescission of this executed agreement. The railway officials made a contract which they ought never to have made, but there is no satisfactory proof that they practiced a fraud upon the complainant. He was willing

Opinion of the Court. Syllabus.

to give twenty acres of his land in order to secure the building of a town on the remainder. He accomplished his object, and has realized large profits. Nearly two years after making his first contract, he ratified it by executing a second deed; and for a period of twelve years, acquiesced in the entire transaction. He then concluded he had been defrauded, and brings this bill. Possibly, the rights of the stockholders and the interest of the public may have been sacrificed, but this complainant has no private grief which he can ask a court of equity to heal.

Decree affirmed.

THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

EDWARD STABLES.

1. *RAILROADS—relative rights over public crossings.* Railroad companies, under their charters, have the same right to use that portion of the public highways over which their track passes as other people have to use the same. Their rights and those of the people as to the use of the highways at such points of intersection are mutual, co-extensive, and reciprocal; and in the exercise of such rights all parties will be held to a due regard to the safety of others, and to the use of every reasonable effort to avoid injury to others.

2. *SAME—presumption.* It will be presumed that the servants of a railroad company having charge of its trains are cognizant of the road crossings along the line of their road; and when any such crossing is obviously a dangerous one, that the employees of the company knew such fact as well as that persons are liable at all times to be in the act of passing.

3. *SAME—diligence measured by the danger.* The degree of diligence and care required of railroad companies, it seems, is not fixed by any definite and precise rule, but depends rather upon the facts and circumstances of the case, so that what would be an unnecessary act in one case would be imperatively demanded in another.

4. *SAME.* It may be that there are places where it would be negligence to construct a road crossing over a highway without making a bridge for

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24a	108
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30a	443
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33a	408
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133	153
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52a	520
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170	57
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74a	392
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78a	51
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Syllabus.

the latter over the railroad track; but at any rate the company must be held to a sufficiently high degree of diligence to overcome, as far as practicable, the danger.

5. *NEGLIGENCE—question of fact.* The question of negligence is one of fact to be found by the jury. It depends, to a great extent, upon the surrounding circumstances of each case; and unless in case of gross acts of carelessness or failure to observe some positive requirement of law, the courts can not adopt any positive rule on the subject.

6. *SAME.* Where a railroad is so constructed that the place where it crosses a public highway is unusually dangerous to the traveling public, as where its track intersects the highway in a cut and is approached on the road by descending a hill, and persons approaching the crossing can not see the railroad track owing to brush and bushes until within a few feet of it, and then only a small portion of it, owing to a sharp curve: *Held*, that a neglect to sound the whistle or ring the bell as required by the statute under such circumstances, would be gross negligence.

7. *SAME—speed of train.* And where a railroad track crossed a public highway at a place of unusual danger and peril to persons who might be passing over such crossing in the highway, and a person traveling over the same with his wagon and team was struck and injured by a passing train which was running at a rapid rate: *Held*, that the speed of the train might be considered in connection with the location of the roads and the other surrounding circumstances on the question of negligence.

8. *SAME—where plaintiff is also negligent.* In case of personal injury from negligence the well established rule of this court is, that the plaintiff will recover even though he was negligent himself, if the negligence of the defendant was so much greater as when compared with that of the plaintiff that the negligence of the latter was slight.

9. *SAME—contributory.* The well established rule of this court in regard to contributory negligence resulting in injury is, that the plaintiff may recover, notwithstanding he was himself negligent if his negligence is slight when compared with that of the defendant.

10. *SAME.* In this case the plaintiff, while in the act of crossing defendant's railroad at its intersection of the public highway, was struck by an engine of defendant, attached to a train, and received severe personal injury. The railroad was in a cut and was approached by defendant on the highway by descending a hill. When about sixty-five yards from the track he stopped his team, looked and listened for the train, and neither seeing nor hearing it he proceeded to cross. In approaching, the track was hidden from view by bushes and shrubs until within a few feet of it, and then only a small part of the track could be seen, owing to a sharp curve in it. It appeared that the train was running at an unusual speed. Plaintiff's horses became frightened and unmanageable so that they required his whole atten-

Syllabus. Opinion of the Court.

tion. It appeared that the statutory signal was not given before reaching the crossing: *Held*, that the defendant was guilty of gross negligence, and that even if any negligence was attributable to plaintiff, it was slight in comparison with defendant's.

11. DAMAGES—*personal injury*. In an action to recover damages for a personal injury from being struck by a train of passing cars, on the ground of negligence, the court instructed the jury in case they found for the plaintiff, in assessing damages they might take into consideration the plaintiff's pain and anguish of mind consequent upon such injury: *Held*, that there was no error. But mental anguish not connected with bodily injury is not proper to be considered in such a case.

WRIT OF ERROR to the Circuit Court of Shelby County; the Hon. ARTHUR J. GALLAGHER, Judge, presiding.

Messrs. MOULTON & CHAFFEE, for the plaintiff in error.

Messrs. EDEN, HALL & WENDLING, and Messrs. HENRY & READ, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case brought by defendant in error in the Shelby Circuit Court against plaintiff in error, to recover damages for injury received by reason of alleged negligence of the employees of the railroad company. It appears that, on the 6th day of July, 1870, defendant in error started to Shelbyville in a two-horse wagon, accompanied by his son and daughter, and when about sixty-five yards from the railroad crossing at which the injury occurred, he stopped and listened, to ascertain if a train was approaching, but hearing none, he started down the hill at a moderate speed, and when on the railroad track his wagon was struck by a passing train and his wagon badly broken and he was severely injured.

It is urged by plaintiff in error that there was gross negligence on the part of defendant in error in the manner in which he approached the crossing, whilst, on the other side, it is insisted that there was gross negligence on the part of the

Opinion of the Court.

company in running at a dangerous rate of speed, and in failing to ring a bell or sound a whistle, so as to give due and timely notice of approaching danger.

In the case of the *Galena & Chicago Union R. R. Co. v. Dill*, 22 Ill. 264, it was said that a railroad company, by obtaining their charter and acquiring the right of way, became invested with the exclusive right to use and enjoy it, except such portions as passed over highways, and as to that portion, in the course of their business, they acquired the right to use it in the same manner, to the same extent, and under the same restrictions as other people; that they had the same, but no better, right to cross a highway with their trains at the point of intersection with their tracks, that individuals have to cross their road at the same point. This right is mutual, co-extensive and reciprocal, and in the exercise of these rights all parties must be held to a due regard for the safety of others. In the exercise of these rights they must be severally held to the use of every reasonable effort to avoid inflicting or causing injury or loss to others; that it would be presumed that the servants of the company having charge of its trains were cognizant of the road crossings along the line of their road, and that persons are at all times liable to be in the act of passing the point of intersection, and they must be on the lookout, so as to avoid injury to such persons, as well as those in their charge, so far as may be done by the use of all reasonable efforts.

In that case it was said that the question of negligence was one of fact, which must be left to the jury for determination; that it depended, to a great extent, upon the surrounding circumstances of each case, and unless there were gross acts of carelessness, or a failure to observe some positive legal requirement, the court could not adopt any rule on the subject; that the jury must necessarily consider the relative situations of the parties, and all of the attendant circumstances, and determine whether there has been negligence or whether the occurrence was purely accidental and without fault of either party. The situation of the parties, the difference in locality, the state

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of the roads, the weather, and many other circumstances which are never the same, and which vary almost infinitely, render it impossible to lay down any precise and definite rule of conduct that should govern in every case. What would be an unnecessary act in one case would be imperatively demanded in another. Where the crossing is on a level, at right angles, and the surrounding country is open, and the view unobstructed, we should not expect the same high degree of caution as should be exercised where the railroad was in a hollow, or deep cut, and approached the crossing on a sharp curve, and the view of the road was obstructed by timber, brush, fences, and the like.

In this case the railroad crossing was approached, from the direction in which defendant in error was traveling, by descending a hill. This railroad track, as appears from the evidence, was in a cut, and the track was hid from view by brush and shrubs between the highway and the railroad, so that a person could not see along the track, in the direction from which the train approached the crossing, until within a few feet of the track; and not then but a short distance, owing to a sharp curve a short distance from the place of intersection; these things all considered, it is obvious the place was one of unusual danger to persons traveling the road; and being of that highly dangerous character, and the danger being so obvious, the employees must be presumed to have known the fact, and were required to observe every precaution which would present itself to the mind of a prudent person; and any omission of a statutory or common law duty must render the company liable for all damages that may result therefrom.

A mere compliance with the requirements of the statute, in sounding a whistle or in ringing a bell, does not authorize those having charge and control of these mighty forces to omit other reasonable and necessary precautions, and to destroy life, or inflict great bodily injury. Because the statute has imposed specified duties, it does not follow that the employees of these companies are released from the dictates of

Opinion of the Court.

humanity or the common legal duty of regarding the rights of others. It may be that there are places where it would be negligence to construct a road crossing over a highway without making a bridge for the latter over the railroad track; this might be the case where it is manifest that human life would be constantly in peril owing to a deep cut and a steep approach to the track; but, be that as it may, when a road is so constructed that its crossing is necessarily dangerous, the company must be held to a sufficiently high degree of diligence to, as far as practicable, overcome the danger.

In this case the crossing would seem to have been highly perilous to persons traveling the highway, and the evidence strongly impresses us that even the statutory duty of sounding the whistle or ringing the bell was wholly omitted; and if so the persons in the wagon were deprived of the warning that was intended to place them on their guard that they might avoid the peril that then threatened their lives—it deprived them of the warning that was intended to enable them to avoid instant and violent death. If the bell was rung, or the whistle was sounded, it is incomprehensible how so many persons whose attention was attracted to the situation of the parties failed to hear them; but all did hear the whistle for brakes as the collision occurred. This can not be fairly said to be negative evidence, as these persons were in a situation to see and hear, and their attention was attracted to what was transpiring; had their attention been directed to other objects it might have been otherwise. But there was a conflict in the testimony, and the jury were fully warranted in finding that the bell was not rung or the whistle sounded, as required by the statute; and if not there was gross negligence, as this was a place of such hazard.

But it is said that, owing to the noise made by the wagon of defendant in error, he did not hear the sound of the approaching train, and would, in all probability, not have heard the bell or whistle. We have but little doubt the reverse of this proposition is true; the difference in the character of the sounds of the wagon and the bell or whistle is so great that

Opinion of the Court.

it could scarcely have failed to attract attention. On the other hand, the noise of the train and the wagon are not so dissimilar as to attract attention. At any rate, defendant in error was entitled to the additional chance of saving his life and of avoiding danger.

Again, the train was running at a rapid rate of speed. All of the witnesses for defendant in error say the train was running very fast; and one of them, faster than he had ever traveled. It may be they could not say that it ran at precisely so many miles an hour—and it is probable that experts could alone have determined that question—but the witnesses, having, at least, ordinary intelligence, could determine whether it ran fast or slow, or whether it was very fast, although they could not state the number of miles per hour. And if very fast, the jury could say whether that, with the location of the road and other circumstances, constituted negligence.

Was the defendant in error guilty of negligence; and, if so, to such an extent as to prevent a recovery? Even if negligent, he still may recover if the negligence of plaintiff in error was so much greater as when compared with that of defendant in error it was slight. This is the rule in regard to contributory negligence; long and uniformly established by numerous cases of this court; and, in establishing and adhering to it in the many cases in which it is announced, it was done with a full knowledge that other courts apparently announce a different rule; but it is regarded as the settled law of this court.

Defendant showed that he was trying to exercise caution when he stopped sixty-five yards from the railroad track and looked and listened for the train; and, neither seeing nor hearing it, he then proceeded to cross the track. An engine driver might have been able to calculate the chances more accurately than he did. The jury, no doubt, declined, and properly so, to determine the question of prudence by so high a standard. He, no doubt, supposed, and it is probable that the great majority of men not skilled or familiar with the speed of railroad trains would have supposed, that, there being no train in hearing, he could have trotted his horses sixty-five yards

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before a train could, at ordinary speed, reach the crossing. And we think his calculation was correct had the train only been run at the usual rate of speed. His horses had passed the track, and a few seconds more would, in all probability, have relieved him from all danger; or, had his horses not become unmanageable on the track, he would have escaped. And there is no evidence that he had the slightest reason to suppose they would have so acted. The unusual speed of the train, then, may have, and no doubt did, contribute directly to the injury.

It is, however, said that it was negligence in defendant in error not to look along the track as he was driving across the track. This may have been negligence; but when we see that he could not see along the track until within a few feet of it, and that his horses required his immediate attention in crossing, we think the jury were warranted in finding his negligence slight when compared with that of the servants of the company.

It is also insisted that the court erred in giving the eighth instruction asked by defendant in error without a modification. The part objected to informed the jury that they might take into consideration pain and anguish of mind consequent on such injury. The instruction is sustained by the case of *The Peoria Bridge Association v. Loomis*, 20 Ill. 235. But we are referred to the case of *Ill. Cent. R. R. Co. v. Sutton*, 53 Ill. 397, where it is said it is error to so instruct the jury, unless the injury is willful, and 2 Greenleaf's Evidence, Sec. 267, is referred to in support of the rule. And that author bases the rule on the case of *Canning v. Williamston*, 1 Cush. 451, which, so far from supporting the doctrine, announces the reverse of the proposition. And a reference to adjudged cases shows the current of authority is the other way. In fact, we can not readily understand how there can be pain without mental suffering: It is a mental emotion arising from a physical injury. It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury, unless the mind is overpow-

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ered and consciousness is destroyed. The mental anguish which would not be proper to be considered is where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury.

But in the *Ill. Cent. R. R. Co. v. Sutton, supra*, the error was not considered of sufficient gravity to require a reversal; and we feel required to modify the rule there announced.

We do not regard the damages excessive, in view of the character and extent of the injuries received by defendant in error. After a careful examination of the record we fail to find any error requiring a reversal of the judgment, and it must be affirmed.

Judgment affirmed.

HENRY SCHALL *et al.*

v.

JOHN BOWMAN *et al.*

1. CONSTITUTION OF 1870—*municipal subscriptions*. The separate articles of the constitution of 1870 of this State having been submitted to a vote of the people separately from the main body of the constitution, and adopted, became a part of the organic law of the State from and after the second day of July, 1870, and a constituent part of the same *eo instanti*.

J. J. SCOTT and SHELDON dissenting.

APPEAL from the Circuit Court of St. Clair County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

Mr. M. MILLARD and Mr. CHARLES C. WHITTELSY, for the appellants.

Mr. L. H. HITE, for the appellees.

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Opinion of the Court.

Mr. JUSTICE BREESE delivered the opinion of the Court :

There are three questions presented by agreement on this record for our consideration, and they are these :

1st. Did the section of the new constitution (submitted separately) in relation to municipal subscriptions to railroads or private corporations take effect before the third day of August, 1870, and thereby annul the right of the city of East St. Louis to vote the subscription ?

2d. Is "The American Bottom Lime, Marble, and Coal Company" a railroad company within the meaning of the law authorizing municipal subscriptions to the capital stock of railroad companies ?

3d. Is the act incorporating said company, or the act amending and reviving the same, of which exhibits C and D to the bill are copies, in conflict with that part of section 23, article 8, of the constitution of 1848, which is as follows, viz : "And no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

We have confined our attention to the first question, as an affirmative answer to that settles the controversy.

We have examined the constitution with care, aided by the able arguments of counsel, and can come to no other conclusion than this : That the separate articles of the constitution of 1870, by the vote of the people taken on the second day of July of that year, became a part of the organic law of the State from and after that day, and a constituent part of the same *eo instanti*.

The schedule of the constitution of 1870, section 8, provides as follows : This constitution shall be submitted to the people of the State of Illinois, for adoption or rejection at an election to be held on the first Saturday in July, A. D. 1870, and there shall be separately submitted at the same time for adoption or rejection (among other sections) the following : The section relating to municipal subscriptions to railroads or private corporations. That section is in these words :

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"No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad, or private corporation, or make donation to, or loan its credit in aid of such corporation; *provided*, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

Section 10 of the schedule, provides a form of the ticket to be voted, containing the general and special propositions, one of which is, "For the section relating to municipal subscription to railroads or private corporations."

Section 11 provides, that "the returns of the whole vote cast, and of the votes for the adoption or rejection of this constitution, and for or against the articles and sections respectively submitted, shall be made by the several county clerks" to the secretary of State, etc.

Section 12 provides, "if it shall appear that a majority of the votes polled are 'for the new constitution,' then so much of this constitution as was not separately submitted to be voted on by articles and sections, shall be the supreme law of the State of Illinois, on and after Monday, the 8th day of August, 1870; but if it shall appear that a majority of the votes polled were 'against the new constitution,' then so much thereof as was not separately submitted to be voted on by articles and sections, shall be null and void."

And it further provides, if a majority of the votes polled, are for either of the sections separately submitted, relating respectively to the "Illinois Central Railroad," "Minority Representation," "Municipal Subscriptions to Railroads or Private Corporations," and "The Canal," then such of said sections as shall receive such majority, shall be a part of the constitution of this State.

The election was held on the second day of July, 1870; the returns were made within twenty days thereafter, in pursuance of section 11, and on the 26th of that month the official can-

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vass was made, and on the 27th the governor issued his proclamation declaring the result.

The election in the city of East St. Louis, authorizing the subscription in question, took place on the 3d day of August, 1870.

Collating the provisions of the constitution bearing on this question, as we have done, it seems difficult to reach any other conclusion than this, that whatever might be the fate of the new constitution as a whole, the separate articles voted, in receiving a majority of the votes cast, became *ipso facto*, and *eo instanti* a part of the organic law of the State. To this conclusion the mind must be led in considering the language used in connection with the object to be attained, and this involves a consideration of the evils of the old system, to remedy which a weighty obligation rested upon the convention.

The provision in question was so framed that it could, appropriately and effectually, become a part of the organic law, without the disturbance of any of its elements, and was a declaration of the people on the 2d day of July, 1870, that from and after that day, no matter what may become of the new constitution, no county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation.

The passion for subscriptions by the municipalities, to every conceivable project presenting itself in a corporate form, was so violent, and prevailed so extensively throughout our State as to demand a speedy, prompt, and efficient remedy.

Under the constitution of 1848, these subscriptions were authorized for corporate purposes, and the taxing power was legally exercised to meet their exigencies. To such an extent had it progressed prior to July 2, 1870, that counties, towns, and cities in this State had become involved to the extent of millions of dollars for which the property and labor of their people were forever pledged. Article 9, section 5, constitution of 1848.

We are unable to find any thing in the constitution itself, or in the schedule thereto, militating against the view we have taken, that this separate article of the constitution of 1870

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went into full effect on the day of its adoption by a vote of the people; that is, on the 2d day of July, 1870. There is no provision of the constitution requiring a different construction.

Counsel for appellee asks, was there any pressing necessity that this section should go into effect thirty-six days before the constitution itself? We answer, the condition of these municipalities, to which we have adverted, and the increasing demand for railroads, many of those enterprises thrust upon the attention of the people so clamorously, admonished the convention they could not be too prompt in arresting the tide. A delay of a single week might have produced insolvents of these municipalities, greatly swelling the already enormous aggregate. Delay might be more extensive ruin.

The counsel further says, that taxation under our form of government is indirectly sanctioned by the people, as they, in a representative capacity, make the assessments and levy the taxes. But this is almost, in fact, a case of voluntary donation by the people of their own funds to an enterprise believed by them to be necessary to their municipal welfare. They ask to be permitted to dispose of their own property as to them seems fit; and courts will not, he trusts, at the instance of a factious few, representing little property and less enterprise, deny them this right unless it is clear that the law under which they act is unconstitutional.

This was the argument which prevailed under the constitution of 1848, yielding to which has caused our vast municipal debt.

Many of those who vote these subscriptions, it was well known to the convention, and to every body else, did not possess a dollar of their own, or own any property to be taxed, but having the voting power, they could so use it in furthering such enterprises, producing as they do many jobs and contracts by which they would profit as individuals with none of the burdens of a tax-payer.

It is no great effort of liberality, or exhibition of public spirit, for a penniless man to vote money out of the pockets of his neighbor. Such, having no property of

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their own to be taxed, have been found willing and eager to deplete, in the shape of taxation, upon the hard-earned gains of others, especially if he himself is to be a participant in the spoils.

It was in the condemnation of such a system the convention so promptly interfered.

The demurrer was improperly sustained. The decree of the circuit court dismissing the bill is reversed and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

Justices SCOTT & SHELDON dissent.

CHICAGO & ALTON R. R. Co.

v.

ELLEN MURRAY.

1. *NEGLIGENCE—liability for personal injury caused by.* In an action against a railroad company to recover for a personal injury to plaintiff on the ground of negligence in the servants of the defendant, the question is, through whose fault or negligence did the injury occur; and if the plaintiff was guilty of contributory negligence, was it slight in comparison with that of the servants of the defendant? If the negligence producing the injury is equal or nearly so, or that of the plaintiff is greater than that of the defendant, he can not recover, but if his negligence was slight in comparison to that of defendant, he may recover.

2. *SAME—instruction.* In such a case, where the vital question was the comparative negligence of the plaintiff with respect to that to be attributed to the servants of the defendant, and the evidence on this point was conflicting and difficult to resolve, the court in two instructions for the plaintiff substantially told the jury that if the defendant by its servants, the engineer and fireman of the engine that caused the injury, were guilty of negligence in managing the engine, then the defendant was liable for such negligence: *Held*, that the instructions in themselves were erroneous, and that although other instructions in the series given for the plaintiff and defendant stated the law of comparative negligence accurately, yet the objectionable ones were calculated to mislead the jury in such a case.

62	326
22a	469
22a	508
69	326
138	388
38a	47
62	326
143	59
62	326
58a	123
62	326
63a	152
62	326
69a	181
62	326
72a	87
62	326
77a	481
62	326
196	1423
101a	38

Syllabus.

3. **INSTRUCTION**—*should be correct in itself without reference to others.* Where the plaintiff's right to recover depends not only upon the fact of negligence in the defendant, but also upon the degree of defendant's negligence as compared with his own contributing to the injury, and the evidence is conflicting and doubtful, his instructions should each be correct in itself without reference to others in the series or those for the defendant. In such case an instruction that if the defendant's servants were guilty of negligence, the defendant is liable therefor, is erroneous, in not further requiring the jury to consider the degree of the plaintiff's negligence.

4. **SAME**—*repeating.* Where the principles of law in instructions asked by a party and refused are substantially embraced in those given at his instance, there is no error in their refusal.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

The court gave the following instructions at the request of the appellee :

1. The jury are instructed by the court, on behalf of the plaintiff, that the defendant is liable for the misconduct, wrongful acts, negligence, or default of all or any of its officers, agents, servants, or employees, when proved, acting in the line of its business or employment.

2. The jury are further instructed, that Ellen Murray had a lawful right to be upon Chestnut Street, and to cross the defendant's railroad at any point where said railroad crossed Chestnut Street; and if the jury believe, from the evidence, that Chestnut Street was a public highway, and that Ellen Murray, while in the exercise of this lawful right was injured by the wrongful act, negligence, or default of the defendant, or its servants, then they will find for the plaintiff.

3. The jury are further instructed for the plaintiff, that while the person injured is bound to use reasonable care, yet she is not held to the highest degree of precaution of which the human mind is capable, and to recover, she need not be wholly free from negligence if the other party has been culpable. Therefore, in this case, even if the jury believe, from the evidence, that Ellen Murray was guilty of slight negligence, yet, if they believe, from the evidence, that the defendant was guilty of gross negligence, and that the negligence of Ellen

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Murray was slight compared with the negligence of the railroad company, then they will find for the plaintiff, and assess her damages at such sum as, under the evidence, they believe her entitled to, not exceeding ten thousand dollars.

4. The court further instructs the jury for the plaintiff, that if they believe, from the evidence, that the fireman on the locomotive engine, which struck down and ran over Ellen Murray (if they believe from the evidence, she was struck down and run over), could, by the exercise of reasonable care and watchfulness, have seen the plaintiff in time to have stopped said engine and prevented injury to her, then the railroad company is liable for the want of care and watchfulness of said fireman, and for any injury which was occasioned by such want of care or watchfulness.

5. The court further instructs the jury that care and negligence are relative, and that the question of liability does not depend absolutely upon the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties, that in proportion to the negligence of the defendant should be the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less will be the degree of care required by the plaintiff to enable her to recover. The plaintiff need not be wholly without fault, but her fault is to be measured by the defendant's negligence. Therefore, in this case, although the jury may believe that Ellen Murray may not have been wholly without fault, yet if they believe, from the evidence, that the defendant has been guilty of gross negligence, and that the negligence of the plaintiff was slight compared with the negligence of the defendant, then they will find for the plaintiff.

6. The jury are further instructed by the court, that in estimating the damage to the plaintiff, in this case, if any, they have a right to take into consideration the personal injury inflicted upon her, the pain and suffering undergone by her, and any permanent injury sustained by her, if the jury believe, from the evidence, that the plaintiff sustained such injuries.

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7. The court instructs the jury that they are the sole judges of the facts in this case, and of the credit to be given to the respective witnesses who have testified, and in determining or weighing the evidence of such witnesses, the jury have a right to take into consideration the motives, feeling, and interest of such witnesses so testifying, if any.

8. The court further instructs the jury, that it was the duty of the engineer and fireman, operating and controlling a locomotive engine in approaching or crossing a public street or highway, to keep a careful watch or look-out ahead of said engine, to prevent injury to persons and loss of life. And if the jury believe, from the evidence, that James Taylor, the fireman upon the locomotive engine which injured the plaintiff—if the jury believe from the evidence she was injured—was in a position where he could have seen the plaintiff, that there was nothing to intercept his view—if he had exercised reasonable care and prudence, and could thereby have prevented the injury, the defendant is liable for the negligence of said fireman, if they believe, from the evidence, he was guilty of negligence.

The jury found the defendant guilty, and assessed the plaintiff's damages at \$7,000. The court overruled a motion for a new trial, and rendered judgment on the verdict. Defendant appealed.

Messrs. WILLIAMS & BURR, for the appellant.

Messrs. STEVENSON & EWING and Mr. W. W. O'BRIEN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This is an action on the case, brought by the appellee against the appellant for personal injuries. At the time the appellee received the injuries complained of, she was about seven and one-half years old. In attempting to cross the several tracks of appellant's road, five or six in number, where the same pass over Chestnut Street, in the city of Bloomington,

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ton, she was struck and run over by an engine, by which one leg was severed from the body, and one hand crushed.

In regard to the comparative negligence of the respective parties in the transaction which resulted in the injuries to the appellee, there is a vast amount of evidence preserved in the record. The real questions in the case are, through whose fault or negligence did the injury to the appellee occur, or, if the appellee was guilty of contributory negligence, was the negligence on her part slight in comparison with that of the agents of the appellant?

Upon these questions the evidence presents a very sharp and difficult issue, and all the controverted facts in the case relate to the conduct of the appellee and the servants of the appellant at the time of the happening of the casualty.

In case of injury resulting from negligence, the doctrine of the comparative negligence of the party injured, and of the party producing the injury, has been so fully recognized, and the distinction so accurately stated in the former decisions of this court, that it is not now deemed necessary to discuss the question anew. It may be regarded as the settled law of this State, as declared in the case of *The Chicago, Burlington & Quincy R. R. Co. v. Payne*, 49 Ill. 499, that when the negligence producing the injury is equal or nearly so, or that of the plaintiff is greater than that of the defendant, in such cases the plaintiff can not recover. On the other hand, although the plaintiff may be guilty of negligence, yet if it is slight in comparison with that of the defendant, the plaintiff may recover. *C. & R. Is. R. R. Co. v. Still*, 19 Ill. 499; *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 74; *Ill. Cent. R. R. Co. v. Midleworth*, 43 Ill. 64; *O. & M. R. R. Co. v. Eaves*, 42 Ill. 288; *St. L., Alton & T. H. R. R. Co. v. Manley*, 58 Ill. 300.

The fourth and eighth instructions of the series given on behalf of the appellee, on the trial, wholly ignore the doctrine of comparative negligence as uniformly held by the decisions of this court.

By those instructions the jury were told that if the appellant by its servants, the engineer and fireman of the engine that

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caused the injury, were guilty of negligence in the management of the engine, then the appellee could recover without any regard to the fact of negligence on her part. Neither of these instructions, if considered alone, states the law correctly as applicable to the facts of this case, and would, doubtless, tend to mislead the jury. The vital question upon which the jury were to pass, was the comparative negligence of the appellee and the servants of the appellant. Upon an issue of this character, where the evidence is so conflicting, as in the case at bar, the jury ought to have been most accurately instructed. The object of instructions from the court is to enlighten the minds of the jury, to enable them to render an intelligent verdict on the evidence that shall be just between the parties.

We can see, in a case like the one at bar, where the recital of the sufferings endured by a plaintiff of such tender years would naturally tend to touch the sympathies of the jury, that instructions so framed as the ones above noticed, would be calculated to mislead the jury. The inclination of the mind of the jury would be to the interest of such a plaintiff, and these instructions would warrant a verdict not authorized on principles of law. It is not a sufficient answer to this view, in a case like the one under consideration, where the evidence is conflicting, and the determination of the question at issue one of difficulty to inexperienced persons, to say that some of the numerous instructions contained in the series given for the appellant and appellee, may have stated, with some degree of accuracy, the doctrine of comparative negligence. In case the jury considered these instructions alone, they could have reached the conclusion stated in their verdict, simply on finding that the servants of the appellant were guilty of negligence, without reference to the fact whether the negligence of the appellee contributed to produce the injury, for the reason that they were distinctly told by the instructions of the court that they might do so. In view of the facts of this case, as developed in the evidence, we are of opinion that it was error in the court to give instructions numbered four and eight on

behalf of appellee, without qualifying them by telling the jury to consider whether the appellee herself had not been guilty of a high degree of negligence, even for a person of her age.

Inasmuch as this case is to be submitted to another jury, to be more accurately instructed, we forbear at this time to comment on the evidence, the sufficiency of which to sustain the verdict is questioned by the assignment of errors.

So far as the instructions asked by the appellant, and refused by the court, state correct principles of law, they were substantially given in the other instructions given at its instance, and therefore there was no error in the court in refusing to give them the second time.

For the error of the court in giving improper instructions on behalf of the appellee, the judgment is reversed and the cause remanded.

Judgment reversed.

PEORIA & ROCK ISLAND RAILWAY CO.

v.

JOHN BIRKETT.

1. *RIGHT OF WAY—damages—conflict of evidence.* Where the land sought to be taken by a railroad company for right of way, situate in the limits of the city of Peoria, was over ten acres, and twenty-five witnesses sworn estimated the damages to the land owner at various sums, ranging from \$1,800 to \$18,000, and the jury assessed the damages at \$5,500: *Held*, that the damages were not excessive.

2. *SAME—finding as to fencing.* On a proceeding to condemn land for right of way by a railroad company, the jury, in their verdict, found the value of the land taken at \$3,000, and the damages, aside from the value of the land taken, to the land owner, over and above the benefits, at \$2,500, making in all \$5,500. It was objected that the verdict was defective in making no reference to the fencing, and keeping the same in repair. It was held that as there was no proof as to the fencing, the jury could not find a verdict as to its cost.

3. While it is true that, in a proceeding to assess damages for a right of way for a railroad company, the cost of erecting and maintaining fences

62	332
44a	399
66	332
47a	290
62	332
167	533

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along the line of the proposed road, is proper to be considered by the jury as an element of damages, yet when no proof is offered on the subject, the jury will not be required to find in their verdict any thing in respect to it.

4. *SAME—of the fee simple title.* Where a proceeding was commenced to condemn land by a railroad company previous to the adoption of the present constitution, under a charter which gave the land appropriated in fee simple to the company, but the assessment of damages was had after the adoption of the present constitution, it was held that the rights of the parties were to be decided under the charter, and that an instruction, telling the jury that the company acquired no title to the land, and that they should consider such fact in assessing damages, was properly refused.

5. *SAME—future damages from changes.* A railroad company condemning land for its right of way must construct its road as indicated by its maps and plans introduced upon the trial of the question of damages. A subsequent alteration will give the land owner a right to recover for damages resulting therefrom.

6. *SAME—instruction.* On an assessment of damages for right of way, where there was a great difference in the estimates of the witnesses, the court was asked to instruct the jury, 1st, that they had no right to take an average of the testimony, and then told them they had no right to set down and add up the amounts sworn to by each witness, and then divide by the number of the witnesses, which was refused: *Held*, that the latter part of the instruction might properly have been given if asked alone, but taken with the first clause, was properly refused as erroneous, and calculated to mislead.

7. *JURY—estimating damages.* A jury may always take an average of testimony, if properly done, by a consideration of all the elements and circumstances which are referred to in the law as proper to aid in determining the weight of evidence; and they should never be told that they have or have not the right to average the testimony, without explanation.

8. *SAME.* A jury, in assessing damages for right of way, have no right to take the gross amount as sworn to, and divide it by the number of the witnesses to obtain the result of their verdict, unless there is afterward full and free consultation, and their judgment assents to it, uninfluenced by any previous agreement.

APPEAL from the Circuit Court of Mason County; the Hon. CHARLES TURNER, Judge, presiding.

This was a proceeding to condemn lands, brought by appellant in Peoria County, and removed, by change of venue, to Mason County. The jury returned the following verdict:

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"We, the jury, find that the value of the plaintiff's land, taken by the defendant, is three thousand dollars. We also find that the damages, aside from the value of the land taken, which the plaintiff has sustained, and will sustain by the taking of the said land, over and above the benefits which will accrue, or have accrued, to him, from the construction and operation of the said railroad, is two thousand five hundred dollars. We, therefore, find for the plaintiff, as the value of his land taken and damages over and above benefits, the sum of five thousand and five hundred dollars."

Messrs. INGERSOLL & McCUNE, for the appellant.

Mr. H. GROVE, Mr. W. W. O'BRIEN, and Messrs. JOHNSON & HOPKINS, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The appellant corporation claims that the damages are excessive; that the verdict does not show who is to fence the road, and who is to make and keep in repair the crossings; and that proper instructions were refused.

From a careful reading of the evidence, we are not prepared to say that the damages are excessive. The land taken lies within the corporate limits of the city of Peoria, and in quantity is over ten acres. Twenty-five witnesses were sworn, whose estimates of the amount of damages range from eighteen hundred to eighteen thousand dollars. According to the witnesses of appellee, the verdict might have been much larger. The jury, under the circumstances, were the best judges of the value of the land; and we can not perceive that so great injustice has been done as to authorize a disturbance of the finding. The character, credibility, and consistency of the witnesses, and their opportunities of knowledge, could be better appreciated by the jury than by this court.

As to the fencing, there is no proof in the record about it. In the absence of such proof, the jury could not find a verdict

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as to its cost. The case of *St. Louis, Jacksonville & Chicago R. R. Co. v. Mitchell*, 47 Ill. 165, merely decides, that it is a proper element, in the condemnation of lands for railway purposes, to consider the cost of erecting and maintaining fences along the line of the road. The authorities therein cited are to the same effect. In that case the company offered to prove, that a contract had been made for the erection of the fence, and that the material was on the ground. In this case no proof whatever was either given or offered in regard to the fencing; and it would be an anomaly to require the jury to find a verdict in regard to a subject-matter about which there was no evidence.

The future liability as to the construction and maintenance of the crossing, is settled by the law. The company must construct the road as indicated by its maps and plans introduced upon the trial. If these should be changed, the land owner could recover any damages resulting from the change.

These principles are settled by the cases of *Jacksonville & Savannah R. R. Co. v. Kidder*, 21 Ill. 132, and *St. L., J. & Chicago R. R. Co. v. Mitchell*, *supra*.

The court below refused to give, for the company, the following instructions:

"1st. That the railway gets no title to the land taken only the right of way, and this fact should be taken into consideration by the jury.

"2d. The jury have no right to take an average of the testimony. They have no right to set down the amount sworn by each witness, and then divide by the number of witnesses. On the contrary, the jury should give to each witness the weight that he deserves, and then decide the case according to the weight of evidence."

We shall consider the last instruction first.

The last clause is unobjectionable; but coupled with the other two, it was not error to refuse the instruction. A jury have not the right to take the gross amount as sworn to by

Opinion of the Court.

witnesses, and then divide by the number of witnesses, and arbitrarily make the result their verdict; but they might adopt this mode of obtaining a result if there was afterward full and free consultation, and the judgment assented to it, uninfluenced by any previous agreement.

A jury may always take an average of the testimony, if properly done, by a consideration of all the elements and circumstances which are referred to in the law as proper to aid in determining the weight of evidence; and they should never be told that they have, or have not, the right to average the testimony, without explanation.

Average means, literally, to or near the truth. In the sense in which the term is used in the instruction, it means, to reduce to a mean, to ascertain the medium between two extremes.

While the jury might properly have been instructed that they could not average the testimony in the mode mentioned in the second clause of the instruction, it would have been manifest error to have told them that they could not do it in any mode, or under any circumstances.

The instruction, as a whole, would have greatly confused and probably misled the jury.

Neither should the other instruction have been given.

The charter of the company, granted March 7, 1867, provides: that all real estate taken, condemned, or appropriated, for the right of way, shall be held by the company in fee simple.

The present constitution provides: that the fee of land taken for railroad tracks, without the consent of the owners, shall remain such owners, subject to the use for which it was taken. Art. 2, Sec. 13.

The proceedings for condemnation were commenced prior to the adoption of the constitution; and the question raised is, whether upon the facts the company will obtain the fee, or only the use of the land.

The first section of the schedule of the constitution saves all actions, prosecutions, etc., of individuals or bodies corpor-

Syllabus.

ate, and makes them as valid as if the constitution had not been adopted.

We do not decide as to the effect of the constitution upon the charter of the company; but are of opinion that, as the company had commenced proceedings for condemnation before the adoption of the constitution, such proceedings were continued as valid, and must be governed by the charter.

The judgment is affirmed.

Judgment affirmed.

JOHN W. CHERRY

v.

CARTHAGE COLLEGE.

1. **CONTRACT—construction.** Where the locating committee of a proposed college required A, the owner of a tract of land near the proposed site of the college, to lay the same off into town lots, and give every eighth lot to the college as a condition to the selection of the proposed site, which he refused to do, until B & C, under a verbal agreement, purchased each a third interest of the land, including streets, alleys, and the lots demanded, at \$200 per acre; and A, then with the consent of B & C, entered into a written agreement with the college to give the lots demanded, which turned out to be six lots; and which agreement provided that the college lots, when laid off, should be appraised and considered as a subscription of so much stock to be equally divided between A, B, and C, reserving to them, however, the right to keep the lots at their appraised value: *Held*, that the agreement, though executed by A alone, was, in fact, an agreement by him and B and C, to subscribe each two lots to the college, A giving two as belonging to himself, and two for each of the others as trustee, holding the legal title for them.

2. **SUBSCRIPTION—construction.** B and C, under a verbal agreement, purchased each an undivided third of a tract of land of A, after which, by the consent of all, A executed a written agreement to the Carthage College to lay off the land into an addition to the town of Carthage, and give every eighth lot to the college, upon condition that the buildings were located at a point near the land; which lots should be appraised and considered as a subscription to be equally divided between A, B, and C, reserving to them the option to pay the appraised value and keep the lots. The land was laid out into forty-eight lots, six of which the college was entitled to un-

22—62D ILL.

Syllabus. Opinion of the Court.

der the agreement. Before their appraisal, B subscribed three shares, of \$100 each, in these words: "B, three shares, including two lots, or cash in lieu thereof, at the option of said B." At the first election of trustees, B paid five per cent of his subscription to entitle him to vote, and A was allowed to vote six votes for the lots. The lots were afterward appraised, no two of them at less than \$300, and sold by the college, A making deeds therefor to the purchaser. A having repudiated his verbal contract with B to sell him one-third interest in the land, the college brought suit against B to recover the balance of his subscription: *Held*, from the circumstances of the case and the similarity of the options reserved in the agreement of A and B's subscription, that the two lots subscribed by B were the two mentioned in the agreement of A; that B's subscription was fully paid in the two lots he was entitled to under his verbal purchase of A, and which the college received; and that the payment of five per cent by B before the lots were appraised, could not be held to be an election to pay his subscription in money.

WRIT OF ERROR to the Circuit Court of Hancock County;
the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. MANIER, PETERSON, and MILLER, for the plaintiff
in error.

Mr. H. W. DRAPER, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought upon a subscription to the capital stock of Carthage College.

The book of subscription in evidence, showed an agreement for subscription to the capital stock of the college of the number of shares, of \$100 each, set after the subscriber's name, to which appears the appellant's subscription, in the following form:

"John W. Cherry, three shares, including two lots, or cash in lieu thereof, at the option of said Cherry."

We find it necessary to address ourselves to one only of the several questions raised, and that is, whether Cherry has complied with the alternative part of his subscription—to give two lots, as was contemplated in the making of the subscription.

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Previous to the subscription, one George W. Carlton had executed to the locating committee of the college, his instrument in writing, under his hand and seal, whereby he agreed, in consideration of the location of the college where it now stands, to lay off a certain addition to the town of Carthage, and further agreed as follows: "I further agree to give said college, or to the joint stock company about to be formed for building said college, one-eighth of the lots when laid off, to be selected as follows, to-wit: said Carlton to have choice of the first seven lots wherever he may choose them, and the college company to have choice of the next two lots wherever they may select them, and so on through the whole number of said lots.

"This agreement is upon the express condition that the said college is permanently located as above stated. The college lots, when laid off, to be appraised and to be considered as subscription of so much stock to the joint stock company, to be equally divided between me and John W. Cherry and Oliver P. Carlton; and if said Carlton, John W. Cherry, and Oliver P. Carlton desire to do so, they are to have the privilege of taking the said college lots at their appraised value."

This agreement bears date January 8, 1870.

It was in evidence that a committee had been appointed to locate the site of the college, and had selected the ground of the present site, but refused to locate the college upon it unless one-eighth of the lots in Carlton's projected addition were subscribed; and that Geo. W. Carlton, who owned the land, refused to give the lots demanded of him; whereupon Cherry went to him and made an offer to give him two hundred dollars per acre for an undivided half interest in the land proposed to be laid off into lots, including the streets and alleys and the lots to be given to the college; and Oliver P. Carlton, who was present, expressing a willingness to take a third interest upon the same terms, George W. Carlton then said that if Cherry and Oliver P. Carlton would purchase and take, each, a third interest, he would accept the terms proposed by the college. A verbal agreement was then made between George W. Carlton, Cherry,

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and Oliver P. Carlton, that the former should lay off the land into town lots and give the college every eighth lot; that the two latter were to have, each, one-third interest in the land, and pay George W. Carlton therefor at the rate of two hundred dollars per acre for the whole piece, including streets, alleys, and the lots going to the college; they were severally to pay one-third of the expense of laying off the lots, one-third of the purchase money when they divided the lots, and the remainder out of the first purchase money arising from the sale of their share of the lots. Oliver P. Carlton paid something toward the expense of laying off the lots, and nothing more, and, finding himself unable to pay for it, gave up his interest in the land.

Cherry never paid any thing toward the land, and, a short time before February 25, 1871, Carlton repudiated the verbal contract of sale to him.

The addition was laid off into forty-eight lots, so that the college became entitled to six. June 4, 1870, the six college lots were selected, and were appraised August 6, 1870, the appraisement of any two of them exceeding \$300; and on the 25th day of February, 1871, they were all sold by the college, either two of them selling for more than \$300.

After the college lots had been selected, the remaining ones were divided between George W. Carlton, John W. Cherry, and Oliver P. Carlton, they all being present and acting together in the division, and each one's name being marked on the lots taken by him, on the plat. George W. Carlton testified that he never would have executed the agreement of January 8, 1870, or have given the amount of lots named therein, but for the verbal contract made between himself, Cherry, and Oliver P. Carlton; that, by such contract, he was, in fact, giving but one-third of the lots named.

It appears, then, in the light of all the attending circumstances, that the agreement of January 8, 1870, of George W. Carlton, to give, what turned out to be six lots, to the college, was, in fact, an agreement by him and Cherry and Oliver P. Carlton to give, each, two lots to the college; that the agree-

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ment was made in the name of George W. Carlton, as the legal title was in him, but that he should be regarded as the real owner of only one-third of the land and the lots agreed to be given; and that Cherry and Oliver P. Carlton were, each, the owner of one-third thereof, under a verbal contract of purchase; and that, in substance, Carlton's agreement was to give two lots for himself, as belonging to him, and, as trustee for Cherry and Oliver P. Carlton, to give two lots for each of them, as belonging to them.

Before Cherry made his subscription the addition had been laid off into forty-eight lots, and so it became known that the number of lots to be given for him, under the agreement of January 8, 1870, was two. When, then, he made the subscription in question of two lots, we are of opinion he referred to the two lots he had contracted for, and which had been agreed to be given for him in the name of George W. Carlton by the agreement of January 8, 1870, and that he did not intend to subscribe two lots in addition thereto, and that the subscription was in view of this clause in that agreement:

"The college lots when laid off to be appraised and to be considered as subscription of so much stock to the joint stock company, to be equally divided between me and John W. Cherry and Oliver P. Carlton."

A further evidence that the subscription was made with reference to the agreement, is the similarity of the option reserved in them. In the agreement it reads: "If said Carlton, John W. Cherry, and Oliver P. Carlton desire to do so, they are to have the privilege of taking said college lots at their appraised value." In the subscription it is: "three shares, including two lots, or cash in lieu thereof, at the option of said Cherry." And such must be taken to have been the understanding of the appellee, or of those acting in its behalf. The agreement of January 8, 1870, was executed to a locating committee of the college; H. W. Draper, its treasurer, and who had been connected with the college from the beginning, drew

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up the agreement, and he had heard from Cherry that he was going to buy, or that he had bought, of Carlton an interest in the land. The college has got all the six lots. We think that is all they are entitled to, from both George W. Carlton and Cherry, under a fair construction of the subscription and the agreement of the former taken together, in connection with the circumstances, provided any two of the lots were equal in value to \$300.

They being of a larger value, and the college having got the two lots contemplated by the subscription, it must be held to be discharged.

We do not regard the payment of five per cent of the subscription by Cherry an election on his part to pay his whole subscription in cash instead of the two lots, as is insisted upon by appellee's counsel. The amount was small; it was necessary to be paid at or before the first election of trustees; that took place March 5, 1870. Cherry might have been willing to pay that sum in order to participate in the election.

The college lots had not then been selected, and Cherry could not then have known at what price his lots would be appraised, or their value, and could not exercise his option to advantage. Again, quite probably it was not then expected that the two lots would pay for the three shares, the words of the subscription rather indicating that.

It is urged as a circumstance opposed to the view here taken, that at the first meeting for the election of trustees, Carlton voted six votes for the lots given under his agreement, and Cherry, at the same time, gave three votes on the amount of his subscription. This, it is true, is a fact tending to show that the subscription and Carlton's agreement of January 8, 1870, were independent of each other, but we do not regard it as a controlling fact in that direction. Cherry himself cast no more votes than he was entitled to.

It seems the motion was made that Carlton be allowed to vote for the lots given by him, and as the lots had not then been selected or valued, the question arose of how many votes he was entitled to, and that it was concluded the lots were

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worth \$600. When they come to be selected and appraised, they were appraised at \$1,200. Carlton seemingly gave more votes than he was entitled to at the time, on the theory we have adopted. But the uncertainty of the value of the lots made it uncertain how many votes were entitled to be cast in respect to them; and, as the result showed, Carlton really cast no more votes than he was justly entitled to in respect to his own interest and that of Oliver P. Carlton. Had it appeared that Cherry had an interest that Carlton should not cast any greater number of votes than he was rightly entitled to, there would have been more force in this circumstance.

It is true that Cherry is admitted to pay his subscription very cheaply in lots he never paid any thing for. But the only just cause of complaint on that score is with Carlton.

The only question as respects the appellee is, whether it has got all that it is entitled to as contemplated by the subscription. Although no payment had been made, the lots contracted for by Cherry and Oliver P. Carlton must be taken as having been selected and turned over to the college, not as the lots of George W. Carlton, but as those of the two former, and as belonging to them by virtue of their verbal contract of purchase. It was something done on the part of George W. Carlton in part performance of the contract, and he afterward did further acts of part performance in the division of the remainder of the lots with Cherry and Oliver P. Carlton, and marking their names as owners on the lots on the plat which fell to their share in the division. The contract was treated by Carlton as valid and subsisting a short time before February 25, 1871, by applying to Cherry for payment of purchase-money under it; and it was not until after this time that the contract was ever repudiated by George W. Carlton.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

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PARKMAN S. NEEDHAM

v.

CHARLES CLARY.

1. **ESTOPPEL.** Where a party made a conveyance of a tract of land to B, and received the purchase money, and afterward brought suit by attachment against A, a former grantee of the plaintiff, whose deed was unrecorded, to recover a sum due from him, and attached the same land, and B interpleaded, claiming title: *Held*, that on the trial of the issue on the interpleader the plaintiff was estopped from defeating the title of B, even by showing that the latter had notice at the time of his purchase of the prior unrecorded deed.

2. **JUDGMENT—upon whom binding.** Where land was attached and a grantee of the plaintiff filed an interpleader claiming title as against the attaching creditor, which the latter attempted to defeat by showing a prior deed from himself to the defendant in attachment and notice thereof to the party interpleading, and the defendant in attachment was in court only by constructive service: *Held*, that a judgment in favor of the party interpleading was not binding as between the two grantees in any future contest between them in respect to the title.

WRIT OF ERROR to the Circuit Court of Coles County; the Hon. JAMES STEEL, Judge, presiding.

Messrs. HENRY, READ & HUGHES, for the plaintiff in error.

Messrs. WILEY & PARKER, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was a foreign attachment brought by Needham against Goodwin. The writ was levied on a tract of land. Clary interpleaded, claiming title, and this issue was tried and found for Clary. From the judgment on this finding Needham appealed.

Clary offered in evidence a certificate of entry issued by the general government to Needham, and a deed from Need-

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ham to himself, executed in May, 1868, upon a nominal consideration of two thousand dollars, but for an actual consideration, as shown by the evidence, of about four hundred dollars. Needham sought to defeat this title by proving a prior unrecorded deed from himself to Goodwin, and that Clary had notice of such deed when he bought.

It is unnecessary to discuss the question of notice, as we are of opinion that Needham is estopped from defeating, by such proof, his own deed to Clary. He executed it, and received for it a valuable consideration, and he, at least, can not be permitted to say that it was a worthless piece of paper because the title had already been conveyed. We must presume that Needham did not intend to perpetrate a fraud on Goodwin in making this second deed, and that he did not consider the first of legal validity; the evidence shows that he probably acted under this conviction. But whether he thought himself legally authorized to make a second deed or not, he did, in fact, make one, for a valuable consideration, and can not now, for his own benefit, allege that it was of no practical effect.

It can not be said that Needham is merely asserting Goodwin's title, and that he can defeat Clary's deed by any evidence that would have been available to Goodwin. In this suit Needham is not claiming under Goodwin, neither are Goodwin's rights so involved in the decision of this interpleader that a judgment in favor of Clary would prejudice Goodwin in any future trial of title between him and Clary. Goodwin is not in court except by constructive service, and is not a party to this interpleader. The question here is not simply whether Goodwin or Clary would have the better title if the controversy were between them, but it is also whether Needham can, in order to collect an alleged indebtedness from Goodwin, set up his own prior deed against a subsequent one, and ask the court to aid him in perpetrating what seems a fraud. His position is certainly peculiar; he has made deeds to two different persons of the same tract of land, and in order to collect the purchase money from the first grantee,

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who has not paid him, he is seeking to sell the title of the second, who has paid him. It should be remarked that there is no evidence of any fraud practiced by Clary upon Needham in order to procure his deed. We are of opinion Needham could not defeat his deed to Clary in the manner he sought to do, and the judgment must be affirmed.

Judgment affirmed.

THE ROCKFORD, ROCK ISLAND & ST. LOUIS R. R. Co.

v.

EDWARD ROGERS.

62	346
149	383
62	346
175	254

1. NEGLIGENCE—*injury by fire from locomotive.* Where a railroad company suffered a heavy growth of dry grass to remain on its right of way through plaintiff's premises, and fire was communicated from the locomotive of a freight train, while laboring to ascend a heavy grade, to the grass and weeds in the right of way, and from thence communicated to the fences and grass of plaintiff, which was destroyed: *Held*, that the company was guilty of negligence, and that the plaintiff was entitled to recover.

APPEAL from the Circuit Court of Madison County.

Mr. LEVI DAVIS, for the appellant.

Mr. CHARLES P. WISE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on the case, brought by appellee in the Madison circuit court against appellant. The declaration contained two counts, and proceeds for the recovery of damages to the fences and grass burnt by the negligence of the company in failing to keep their right of way through appellee's farm free from dry grass and weeds, which took fire from

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their locomotives, and was thereby communicated to appellee's fences and grass, which was injured and destroyed to his damage. Both counts are substantially the same; the company pleaded the general issue; a trial was had, resulting in a verdict in favor of appellee, for four hundred dollars damages, upon which judgment was rendered, and the company appeals to this court.

The only question raised by appellant is, whether the evidence shows negligence of the company. There seems to be no doubt that there was an undergrowth of grass on the ground, which had grown the previous fall, and which had not been burnt off or otherwise removed. It appears to have been meadow on both sides of the road up to the track, and that the fire communicated from the passing train, and the jury have found that it was from the engine, and not from fire-crackers thrown by passengers from the train.

It also appears that there is a heavy grade at the place of the accident, which the train was ascending, and we think the evidence shows the locomotive was laboring to get up, on account of the heavy freight and passenger train attached; and if so, there would be more fire thrown out than when the train is light and the engine works easily; this, with the right of way foul, would greatly enhance the danger of communicating fire; this would seem to be apparent to all prudent persons, and would necessarily call for greater diligence on the part of the company. The evidence shows that the fire caught in the grass on the right of way of the company, and communicated from that to the meadow, owing to the heavy growth of grass, which seems to have burnt with violence notwithstanding the season of the year.

If, then, the fire originated on the right of way, and the weight of evidence is that it did, then had the company taken the precaution to burn it off early in the spring the injury would not have occurred; and the act of March 29, 1869 (Sess. Laws, 312), declares that when fires shall be communicated from passing trains and locomotives, it shall be taken as full *prima facie* evidence to charge the railroad com-

Opinion of the Court. Syllabus.

pany with negligence; this law was in force and applied to this company, and there is no evidence to rebut the presumption of negligence created by the statute; on the contrary, the evidence tends strongly to establish negligence that should charge the company. The jury were fully warranted by the evidence in finding as they did, and the judgment must be affirmed.

Judgment affirmed.

JOHN O. REED *et al.*

v.

ANDREW E. DOUTHIT *et al.*

1. *DEED—delivery—presumption.* When a deed is produced by the grantee named therein, the presumption of law, in the absence of proof to the contrary, is that the deed was signed and sealed according to its purport, and that the grantee, having it in his possession, received it from the grantor.

2. The requisites of a deed to convey land are, signing, sealing, and delivery, and when the deed is recorded by the grantee, even after the death of the grantor, the burden is on the grantor, or those claiming as his heirs, to prove clearly that the appearances are not consistent with the truth. The presumption of delivery must be destroyed by clear and positive proof.

3. *DEED—delivery upon voluntary settlement.* The law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially when made to infants, than in ordinary cases of bargain and sale.

4. *DEED—delivery.* Where it appeared that a father had made advancements to his adult children and afterward signed, sealed, and acknowledged a deed for certain lands to his minor son, stating that he intended to make a provision for such son, but expected to live on the land until his death, and afterward spoke of the land as his son's, and the son exercised acts of ownership over it and leased portions of it before his father's death, and about sixteen months after the death of the father had the deed to himself recorded: *Held*, even if the father retained possession of the deed until his death that fact would not invalidate or defeat it.

5. A delivery of a deed is not to be proved by the grantee in it, but will

62	348
125	436
62	348
141	400
62	348
148	430
62	348
155	295
62	348
159	661
62	348
160	358
62	348
174	429
62	348
189	324
62	348
195	617
62	348
212	398
214	1868

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be presumed; and if not delivered the retention of the deed by the grantor until his death will not destroy its effect as a deed when the circumstances or proof show it to be a voluntary settlement for a meritorious consideration upon an infant by a parent.

WRIT OF ERROR to the Circuit Court of Shelby County; the
HON. ARTHUR J. GALLAGHER, Judge, presiding.

Messrs. MOULTON & CHAFFEE, for the plaintiffs in error.

Messrs. HENRY, HALL & WENDLING, for the defendants
in error.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was a bill in chancery in the Shelby circuit court brought by the descendants of John Douthit, deceased, who died intestate, for a partition of the lands of which their said ancestor died seized, and to which bill Andrew E. Douthit, Nancy Stewartson, and William H. Douthit, children of John Douthit, and Matilda Douthit, widow of John Douthit, were made defendants. William H. and Matilda Douthit made separate answers, William denying that his father, John Douthit, died seized of the north-west quarter of the south-east quarter, and north-east quarter of the south-west quarter of section thirteen (13) and south-east quarter of the south-east quarter of section two (2) in township eleven (11) north, range four (4) east, of which partition was claimed by the bill of complaint, but that the same was sold and conveyed to him by John Douthit and Matilda, his wife, and that he was put in possession, and made valuable improvements thereon. These lands, it appears, composed the "Home Farm," so called, or a part of it. Matilda Douthit was the widow of John Douthit, his wife by a second marriage, to whom there was born an only child, the defendant William. Matilda, in her answer, denied that John, her husband, owned these lands, and she claimed no dower in them. Replications were put in and the cause set for hearing, on bill, answers, replications, and proofs.

Opinion of the Court.

Much testimony was taken, and the court excepted from the decree of partition the above described lands, holding the same were the exclusive property of William H. Douthit in virtue of his father's deed.

The point made here by plaintiffs in error, and it is the only one, was there a delivery of the deed from John Douthit and wife to William H., under which he claims title?

The deed was executed and acknowledged November 25, 1868, and filed for record on the 9th of February, 1870, about sixteen months after the death of John Douthit, he dying about the close of the year 1868. William, at the date of the deed, was about seventeen years of age, and the only child of his parents living with them.

There is no proof of an actual delivery of this deed by the grantor to the grantee, but it was in the possession of the grantee after the death of his father, and by him placed on record.

It is claimed by plaintiffs in error that it is incumbent on a grantee who is in possession of a deed, to show affirmatively, a delivery.

We do not understand the law so to hold. The requisites of a deed to convey land, are, signing, sealing, and delivery. When a deed is produced by the grantee named therein, what are the presumptions of law? They are, that the deed was signed and sealed according to its purport, and the grantee named in it, having it in his possession, is presumed to have received it from the grantor. In the absence of all fraud in the case, and none is charged or shown in this case, this presumption must obtain and must prevail, unless rebutted by some strong facts in evidence. The formal act of signing, sealing, and delivery is the consummation of the deed, and the burden is always on the grantor to prove clearly that the appearances are not consistent with the truth. The presumption is against him, and the task is upon him to destroy that presumption, by clear and positive proof, that there never was a delivery. *Sowerby v. Arden*, 1 Johns. Ch. 239; *Chandler v. Temple*, 4 Cushing, 285.

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The magistrate who took the acknowledgment of this deed testifies that he had a conversation with John Douthit, the grantor, before he took the acknowledgment, in which Douthit said he had given his older children as much as he could afford, and wanted him to take the acknowledgment of a deed to William. He said he was getting old and wanted to make this deed to William, so that there would be no trouble about it afterward. He said he calculated the property he got of William's mother to be for him; and he heard him say, at different times, after the deed was acknowledged, that the farm belonged to William, but that he expected to live on it the balance of his days.

On the cross-examination of James Patterson, a witness for defendants in error, he testified that when talking about this land, he understood William to say his father had made him a deed, and this was said in the lifetime of John Douthit. This declaration of William was called out by the plaintiffs in error, and is evidence for him.

In connection with this, it is in proof William went into possession of this land in 1860, and continued in possession, exercising acts of ownership over it, and claiming it as his own up to the time of the death of his father, he cognizant of the fact; and during that time, without consulting his father, he rented the land two different years.

In the case of *Ward et al. v. Lewis et al.*, 4 Pick. 518, where an assignment by indenture tripartite of an insolvent debtor, in trust for his creditors, purporting to have been delivered by the debtor to the trustees and some of the creditors, one part of which was found in the hands of the trustees, another was, several months after the date, in the hands of the creditors, and in adjusting their claims was often referred to as well by the trustees as by the creditors, the debtor's property having passed into the hands of one of the trustees, who appeared before the creditors in the character of trustee, and made proposals to the creditors in the name of all the trustees, and it was often spoken of by him as being held under the assignment, and was sold by him for the benefit of the creditors; and the debtor,

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when he requested one of his creditors to execute the indenture, informed such creditor that he had assigned his property for the benefit of his creditors, it was held that this was sufficient evidence of a delivery of the deed by the debtor to the trustees and to the creditors.

We are of opinion these cases fully establish the proposition that it is not incumbent on the grantee to establish, by proof, the delivery of the deed under which he claims. The possession of the deed and exercising ownership over the estate is strong presumptive evidence of a delivery.

But this was a deed made by a father to his infant son, and was a voluntary settlement of this land upon the son, and the meritorious or moving cause was the property his mother had brought to the grantor, and the further fact that he had suitably advanced his other children.

As to the first branch of this proposition it is well settled that the law makes stronger presumptions in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than in ordinary cases of bargain and sale. *Bryan et al. v. Wash et al.* 2 Gilm. 557; *Masterson et al. v. Cheek et al.* 23 Ill. 72. In the view that this was a voluntary settlement upon the son, the decisions are uniform that the possession of the deed by the grantor until his death did not invalidate or defeat it. *Vilbos v. Beaumont*, 6 Vernon, 100; *Bole v. Newton*, id. 464; *Boughton v. Boughton*, 1 Atkins, 625; *Claving v. Claving*, 2 Vernon, 475.

These cases were recognized as authority by Chancellor Kent in *Bonn v. Winthrop*, 1 Johns. Ch. 329, wherein he says: "The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death."

On either hypothesis, then, the decree ought to be affirmed. A delivery of a deed is not to be proved by the party holding it, but it will be presumed, and if not delivered, the circumstances show it was a voluntary settlement, for a meritorious consideration, upon an infant, and the retention of the deed by the father until his death did not destroy its effect as a deed.

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We find nothing in the record to destroy the presumption the deed was delivered to William.

But if it was not delivered, and was intentionally retained by the grantor until his death, it being intended as a voluntary settlement upon the son, it must, under the authorities, have the force and effect of a valid deed conveying the fee in the land mentioned therein.

No inference can be drawn, unfavorable to the defendants in error, from the fact that his parents went upon the farm while William was residing upon it, and built a house upon it. They first went into the same house with William, but the old gentleman, believing that he and his aged wife would be more comfortable in a house to themselves, and having plenty of means, he put up one for his accommodation. The old gentleman told Andrew, one of his sons, before he built the house, that he wanted to build it for his own comfort and convenience, but was afraid his children would make a fuss about it, because he was putting more improvements on William's land than on the land of any of the other of his children. To this Andrew replied that he thought he had a right to do so, for he thought his step-mother, William's mother, brought sufficient for that purpose, and that he had a right to use his own pleasure about it. This is the testimony of Mrs. Elizabeth Stewartson, one of the heirs-at-law of John Douthit.

A careful consideration of all the facts in this case satisfies us that this deed to William, if not actually delivered to him, was intended by his father as a settlement upon him, and it must be upheld as valid and effectual, in the absence of all fraud.

In whatever light the case is to be viewed, we are satisfied the decision of the circuit court was correct, and we affirm the decree.

Decree affirmed.

Syllabus.

THOMAS O. SMITH

v.

ALICE E. SLOCUM.

1. **TRESPASS TO THE PERSON**—*preservation of order in party's family.* The authority to govern is placed by the law in the hands of the father, as the head of the family. It is as unlawful for a grown son or daughter to create a disturbance in the family as for a mere stranger; and the father may as rightfully interpose to preserve the good order and propriety of his household in the one case as in the other.

2. **SAME.** Where a grown daughter, who had been married and had left her husband and was living in her father's family, got into an angry dispute with a hired girl, and when ordered by her father to leave and go to her own room, refused to do so, and in her dispute with her father, made remarks imputing a want of chastity in her step-mother in her presence, and in that of several others, it was held that the father had a right to protect his wife from such slanderous abuse the same as from a mere stranger, and to exercise his authority as the head of the family in moderation to preserve the order of his family, and if in so doing he used no more force than was necessary, he was not liable in trespass.

3. **NEW TRIAL**—*finding against the weight of evidence.* Where the testimony of the plaintiff in an action of trespass for personal injury is wholly unsupported as to the material facts, and is contradicted by the testimony of the defendant and several other disinterested witnesses as to such material facts, and no reason appears for rejecting or discrediting the testimony of the defendant and his witnesses, and the verdict of the jury can be supported on no other ground: *Held*, on appeal, that the verdict was against the weight of the evidence.

4. **SAME.** It is the duty of a jury to find according to the weight of the evidence, and not capriciously on the testimony of a single witness who is a party to the suit, in opposition to the evidence of numerous other unimpeached and intelligent witnesses, who appear to have stated the details of the facts honestly as they saw and heard them.

5. **SAME.** It is an unwarranted assumption of power in a jury to reject the evidence of a great number of disinterested and unimpeached witnesses and found their verdict alone on that of an interested witness who is a party to the suit. Their verdict should be a just and fair conclusion from the whole evidence.

6. **SAME.** In all that class of cases sounding merely in damages, where the recital of the facts touch the sympathies or arouse the prejudices to such an extent as to obscure the understanding of the jury and prevent them from exercising their better judgment, it is the plain duty of courts to super-

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vise their verdict and see that it is the conclusion of that deliberate judgment that ought to characterize all judicial proceedings, and not the result of passion or prejudice.

APPEAL from the Circuit Court of DeWitt County ; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WILLIAMS & BURR and Messrs. NELSON & ROBY, for the appellant.

Messrs. BUNN & BUNN and Messrs. CREA & EWING, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

This was an action of trespass, to recover for personal injuries, brought by the appellee against the appellant in the circuit court of Macon County, and the venue was subsequently changed to the county of De Witt, where a trial was had, which resulted in a verdict for twelve thousand dollars in favor of the appellee. A motion was made for a new trial, and the court required the appellee to remit two thousand dollars from the verdict, and thereupon overruled the motion and entered a judgment against appellant for ten thousand dollars.

The only point made by counsel that we deem material to be considered is, whether the verdict is sustained by the evidence, or, rather, whether the verdict is not against the weight of the evidence ?

The appellee is the daughter of the appellant, and has been married since 1869, but was living separate from her husband, and was at the time of the difficulty, as she says, a boarder in the family of the appellant. The case, on the part of the appellee, so far as the events that transpired at the house are concerned, rests entirely on her own evidence. There were a number of persons present, all of whom give a different version of the affair.

The controversy that led to the committing of the trespass complained of, arose with the hired girl in regard to some-

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thing which appellee alleges she had been saying about her that was untrue. The girl was engaged in preparing dinner for the family, and when the disturbance commenced she told the wife of the appellant that if the appellee did not leave she would. The appellant was called, and on entering the room found the appellee and the girl engaged in an animated quarrel. He requested his daughter, the appellee, to leave the kitchen, which he says she did, but soon returned, and again renewed the controversy with the girl. The appellant was again called in to quiet the disturbance, and the respective statements of the events that there occurred are as opposite as truth and error.

It must be conceded that the appellee was in error in the first place, and that her wrongful act was the cause, to some extent at least, of the consequences that followed. Her own statement is, that she was a boarder at the house of the appellant, and it was certainly improper in her to engage in a difficulty with the hired help to the annoyance of the family. If the girl had been saying things about her that were untrue, she ought to have gone to her father with her grievances, and if, upon inquiry, it had turned out to be true it would have been his plain duty to dismiss the girl from his service.

It appears from the history of the difficulty, as given by the appellee herself, that when the appellant was called into the kitchen to quiet the disturbance, he requested her to go to her own room, but that she declined to go on two grounds: first, that she had done nothing for which she ought to be sent to her room; and, second, that she had as much right there as he had, for the reason, that the house had been purchased with money that had belonged to her mother. In the conflict that there ensued, she says, that the appellant then took hold of her, and most cruelly beat and otherwise ill-treated her, in consequence of which, she suffered great bodily and mental pain, and that her health has been permanently impaired.

The appellant denies having inflicted any physical injuries on the appellee, and his account of the unhappy affair is cor-

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roborated by the evidence of Mr. and Mrs. E. O. Smith, the hired girl, Emma Flory, and, to some extent, by that of the two younger sisters, members of the family of the appellant. It appears that the mother of the appellee is dead, and that the appellant had been married a second time, and, perhaps one of the exciting causes of the conflict was a remark addressed to the appellant, in regard to her step-mother, who was present in the room. The remark was addressed to the appellant in the presence of his wife and others, and implied that she was an unchaste woman previous to her marriage with appellant. The appellee explicitly denies having used any language toward her step-mother that was not entirely respectful. It is, however, distinctly sworn to by three witnesses, the appellant, Mrs. E. O. Smith, and Emma Flory, that the improper language was used. Unless these witnesses have deliberately committed perjury, the objectionable words were addressed to the appellant in regard to his wife in her presence. This does not imply that the appellee has willfully sworn to any thing that is untrue. By no means. She was in anger and doubtless very much excited, and may have used the objectional words and may not have remembered it. There is no such excuse for the other witnesses. They could not say that they remembered the utterance of the words, when, in fact, no such words were used. Their testimony is either the truth, or it is willful and corrupt falsehood.

The language addressed to the appellant in regard to his wife was such as no husband could permit, whether by a member of his own family or a stranger. Had a stranger used such slanderous words to the appellant in his own house in regard to his wife no one would deny his right to have ejected him at once from the premises. He would have precisely the same legal right to protect his wife from such slanderous accusations by a member of his family as from a stranger. The law makes no distinction.

If we shall take the most favorable view possible of the case the appellee had no right to continue to wrangle with the hired girl after the appellant had requested her not to do so. She

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ought to have left the room. This she refused to do, and when the appellant undertook to assert his authority to preserve the peace of his household a struggle ensued. She resisted with all the strength she had, and if the evidence on the part of the defense can be relied on, the appellant did not use any more force than was absolutely necessary to remove her from the room.

The authority to govern must rest in some one, and the law has placed that power in the hands of the father as the head of the family. His right to exercise such authority in moderation and justly will not be denied. It is as unlawful in itself for a grown son or daughter to create a disturbance in the family as for a mere stranger, and the father may as rightfully interpose to preserve the good order and propriety of his household. It is admitted by the appellee that she was engaged in an angry dispute with Emma Flory, and that she refused to submit to the authority of the appellant when requested to do so, and no reason is perceived why he could not interpose to preserve the peace of his family if he used no more force than was absolutely necessary for that purpose.

It is insisted that inasmuch as the jury saw the several witnesses and heard them testify and have given credit to the evidence of the appellee by finding the issues for her, under the decisions of this court that the jury are the judges of the credibility of the witnesses, the verdict ought not to be disturbed.

The jury, in order to be able to find the verdict which it did, had necessarily to reject all the evidence offered for the defense as unworthy of belief. The verdict could be found on no other hypothesis.

The facts relied on to support a recovery are sustained alone by the evidence of the appellee. Her testimony is to the effect that the appellant committed a most wanton assault upon her. She says that the marks of violence were perceivable on her person for days and weeks afterward, and that her health has been permanently impaired.

The appellant solemnly denies that he inflicted any injuries

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on the person of the appellee. He says that she was disturbing the peace of his family on a Sunday morning; that he requested her to desist, and on her refusal he undertook to make her go to her own room. The evidence of the appellant as to the events that transpired is fully corroborated by that of three or four unimpeached witnesses, who were present and saw the entire struggle between the parties.

Could the jury properly reject the testimony of the several witnesses for the defense and find their verdict solely on the evidence of the appellee? This is the real question in the case.

It is said that the appellee is, to some extent at least, corroborated in her evidence by disinterested witnesses; that the bruises that were seen on her person by the physicians and others must have been produced by blows inflicted by the appellant, and were the cause of the sickness that ensued.

Here again the evidence greatly preponderates in favor of the appellant. The appellee states that her health had always been good previous to the difficulty. Certainly as many as four of the lady witnesses all testify that she had previously complained to them of the same sickness. All of these witnesses, with the exception of one, were her daily companions, and it is not unreasonable that they should have talked with her on the subject of her health. It does not militate against the testimony of these witnesses that the appellee had not talked to others of her acquaintance on this subject of her sickness.

The fullest credence may be given to the medical testimony, and it in no wise conflicts with the evidence given for the defense. The witnesses all state that, in the struggle, the appellee threw herself upon the stairway and on the floor at the head of the stairway with great violence when the appellant was some distance from her, which would account for the bruises discovered by the physicians and others on her person, and would, perhaps, be sufficient to produce the results testified to by the medical witnesses.

It is manifest that the jury arbitrarily rejected all the evidence offered for the defense and relied solely upon that given

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by the appellee. This they had no right to do. It was the duty of the jury to find according to the weight of the evidence, and not capriciously on the testimony of a single witness. By no fair construction can it be said that the testimony of the appellee outweighs the evidence of the numerous witnesses on behalf of the appellant, or that she is entitled to any more credit than any one of them.

It is only just to say that the appellee and all the witnesses on the part of the defense have stated the details of the difficulty honestly as they believed that they occurred, but it is most reasonable to say that the theory that is sustained by the greatest number of intelligent and unimpeached witnesses is the true one and ought to have been adopted by the jury.

As a general rule, it is the province of the jury to judge of the credibility of the witnesses and to say what weight shall be given to the evidence; but then they must do so intelligently and not arbitrarily. We said, in the case of the *St. L. A. & T. H. R. R. v. Manly*, 58 Ill. 300, that the jury could not, capriciously, disregard the evidence of an unimpeached witness simply because they desired to do so, or because they might wish to find a verdict against his testimony. So we say in this case that it was an unwarranted assumption of power in the jury to reject the evidence of so great a number of disinterested and unimpeached witnesses and found their verdict alone on that of an interested witness, and herself a party to the record. This would be a perversion of the plainest principles of justice.

It is the duty of the jury to try the case according to the evidence, and their verdict should always be a just and fair conclusion from the whole evidence. As we said in the case cited above, we know, from common observation, that it is exceedingly difficult for juries, in a certain class of cases, to observe this reasonable and just rule. This is eminently true in that class of cases sounding merely in damages where the recitals touch the sympathies or arouse the prejudices to such an extent as to obscure the understanding of the jury and prevent them from exercising their better judgments. In all that

 Opinion of the Court. Syllabus.

class of cases it is the plain duty of the court to supervise the verdict and to see that it is the conclusion of that deliberate judgment that ought to characterize all judicial proceedings, and not the result of passion and prejudice. *Lockwood v. Onion*, 56 Ill. 506; *St. L. A. & T. H. R. R. v. Manly*, *supra*.

The case at bar comes within the principles of the cases cited.

The recital of the wrongs which the appellee may have honestly believed she had suffered at the hands of the appellant would touch the sympathies of any one, but that affords no just reason for disregarding the well-settled rules of law.

No satisfactory reason has been suggested, and none can be, why the evidence given by so many witnesses should be rejected and that of the appellee credited, which is certainly uncorroborated as to the principal facts, and the verdict based on it.

In view of the evidence we can not say that the verdict is the result of the deliberate judgment of the jury uninfluenced by any improper motives or any undue sympathy for appellee. Indeed, we think it is not. The jury have evidently misjudged as to the weight of the evidence. It can not be justly said that the weight is on the side of the appellee.

In our opinion this verdict is against the weight of the evidence, and the judgment, for that reason, is reversed and the cause remanded.

Judgment reversed.

 CHALKLEY BELL

v.

ROBERT PREWITT.

1. CHATTEL MORTGAGE—*evidence of fraud*. The mere fact that the mortgage recites a greater indebtedness than actually existed at the time of it

62	361
29a	162
80a	120
62	361
40a	226
361	
30	
30	361
193a	628

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execution is not conclusive evidence of fraud. It is a fact to be left to the jury, who must determine from all the circumstances whether it was inserted in the mortgage with the design to shield the property of the mortgagor, and to hinder and delay creditors. The transaction must be real, and entered into in good faith to secure against present or future liability.

2. *SAME—description of chattels.* A chattel mortgage duly acknowledged and recorded, after describing certain other chattels as then upon the farm of the mortgagor, contained this description, to-wit: "20 two-year old steers on same farm." It was objected that this description was insufficient to identify the property as to others dealing with the mortgagor: *Held*, that the record of the mortgage was sufficient notice to subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm, and that parol evidence was necessary and admissible to identify the particular cattle.

3. *SAME—admissions of mortgagor.* The declarations and admissions of a mortgagor of chattels, made after the execution of a chattel mortgage by him, are not admissible in evidence to defeat the claim of the mortgagee, in a contest between the latter and one claiming under the mortgagor.

4. *EVIDENCE—cross-examination.* The rule in this State is, that when one party introduces and examines a witness, the cross-examination is limited to the facts elicited by the examination in chief. When such cross-examination is carried to an unreasonable length upon new matters, and thereby improper testimony is obtained, it is error.

5. *SAME.* Where in a contest between the mortgagee of chattels and an assumed purchaser, the former called the mortgagor and proved by him a single fact, viz.: that the cattle in controversy were the same described in the chattel mortgage; and the court then permitted, against objection, a lengthy examination of the witness by the opposite party in regard to the consideration of the mortgage, and various other matters, not elicited in the examination in chief, and wholly disconnected therewith, and a verdict resulted against the mortgagee: *Held*, that for this error the judgment must be reversed.

APPEAL from the Circuit Court of McLean County; the HON. THOMAS F. TIPTON, Judge, presiding.

This was an action of replevin, by appellant against appellee. Appellant claimed the right of possession and property in twelve head of cattle under a chattel mortgage given him by George Cornelius, dated November 21, 1870. The property was described as follows: "20 yearling steers, now on the farm of said Cornelius, in Towanda Township, McLean County,

Statement of the case.

Illinois; 20 two-year old steers on same farm," etc. The property claimed was under the second clause in the description. The appellee claimed to be a purchaser of the cattle on December 1, 1870, under a verbal agreement made before the execution of the mortgage, by the mortgagor, that if he did not pay the appellee a debt he owed him for pasturage by the last named day, the cattle were to become the property of appellee absolutely in payment of the debt. Upon this point the testimony was equally balanced, the mortgagor denying the sale. The mortgage was attacked on the ground of fraud. It purported to be for the consideration of twenty-five hundred dollars to secure a note of mortgagor to mortgagee of that sum. At the time of its execution the mortgage was security for the mortgagor on a note of five hundred and eighty dollars, which the mortgagee subsequently paid. The mortgage was drawn up, executed, and recorded without the knowledge of the mortgagee, to secure him as security on the note of five hundred and eighty dollars, and to indemnify him in becoming security in the future on other obligations. The mortgagee neither consented nor declined to assent to the giving of the mortgage, but after its execution and record, became security upon a delivery bond for the mortgagee in the sum of fifteen hundred dollars. The mortgage contained a provision allowing the mortgagor to retain possession of the property until default, with a provision that if the same, or any part thereof, should be attached, or levied upon by any creditor, or the mortgagor should sell, or attempt to sell, the same or any part thereof, without the consent of the mortgagee, or the same, or any part thereof, should be rendered less valuable by misuse or abuse by or through the mortgagor, then the mortgagee might take immediate possession and sell the same.

The court, on the request of appellee, instructed the jury as follows:

1. If the jury believe, from the evidence, that the defendant, Prewitt, pastured certain cattle and other stock for

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George Cornelius (mortgagor) during the summer of 1870, and that on or about October 1, 1870, took away a portion of the stock, and then agreed that a portion of the cattle should remain in Prewitt's possession as a pledge or security for the payment of the pasturage on the entire lot of stock ; and that if the said pasturage was not paid by the 1st of December, 1870, that in that case Prewitt was to be the owner of the cattle, and they were to be taken from the pasturage; and if they further believe, from the evidence, that the pasturage was not paid, and that the cattle were the same replevied, then the law is that Prewitt is the owner of the cattle, and the jury will so find, and will find, as a part of their verdict, that the said defendant is the owner of the cattle in controversy.

2. If the jury believe, from the evidence, that the defendant, Prewitt, pastured certain stock during the summer of 1870, for George Cornelius ; and if they further believe, from the evidence, that, on or about the first day of October, 1870, the said Cornelius took any or part of the stock under an agreement with said Prewitt ; that a portion of the steers should remain in Prewitt's possession as a pledge or security for the payment of the pasturage for the entire lot of stock ; and if they further believe, from the evidence, that the pasturage was, and still is, unpaid, and that the cattle thus pledged are the same as those replevied in this suit, then the law is, that Prewitt had a special property in the cattle pledged until the payment of the account for which they were pledged, and the jury will find for the defendant.

3. The jury are further instructed that the foundation of the mortgage is the note therein described. That the mortgage is a mere security for the payment of the note, and the plaintiff can not recover in this suit, unless he has proven the existence of the note described in the mortgage, if any is described ; and if the note described in the mortgage has not been introduced in evidence, nor its absence accounted for, and there is no evidence showing the existence of such a note, the plaintiff can not recover, and the jury will find for the defendant.

4. That a person claiming property under a chattel mort-

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gage, must see to it that the property is correctly and truly described, so that others may not be deceived. The mortgage must speak for itself, and it is for the jury to determine whether the property therein described is the same property replevied in this suit, and if it is not, then plaintiff can not recover.

5. The jury are further instructed, that the burden of proving his case is on the plaintiff, and in order to recover in this suit, he must prove, by a preponderance of the evidence, that the defendant wrongfully took the cattle in controversy, or that he wrongfully detained them after demand made by the plaintiff.

The jury found the issues for the defendant. Plaintiff moved for a new trial, which was overruled by the court, and judgment rendered on the verdict. Exceptions taken. Plaintiff appealed to this court, and assigned various errors, the principal ones being:

1. The admission of improper evidence on the part of the defendant.
2. The giving improper instructions for defendant.
3. That the verdict was against the law and evidence.
4. The overruling motion for new trial.
5. The allowing an improper cross-examination of Cornelius, the mortgagor, by defendant.
6. Allowing defendant to attack the consideration of the mortgage.

Messrs. SHACKLEFORD & POLLOCK, for the appellant.

Messrs. STEVENSON & EWING, for the appellee, contended that the mortgage was void as to creditors for two reasons, 1st. That it did not identify the property with sufficient certainty, and that parol evidence was inadmissible to supply this defect; 2d. That the mortgage was executed in fraud of the rights of creditors.

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Also, that appellee had a prior and superior right to the cattle.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

This was a contest between a mortgagee of personal property and an assumed purchaser.

We shall not comment upon the testimony, as the judgment must be reversed for errors of law. The alleged fraud, in the execution of the mortgage, is purely a question for the jury, from all the evidence. As the case was not fairly and properly presented to the jury, there should be a new trial before any opinion is expressed as to the weight or effect of the evidence by this court.

The mortgagor was introduced as a witness for appellant, and testified only, that the cattle in controversy were the same cattle mentioned in the mortgage.

This was for the purpose of identification of the mortgaged property, and did not present any other question. The property described was, "twenty two-year old steers on the same farm;" and the parol proof was necessary to show that the property in controversy and the property mentioned in the mortgage were the same. The record of the mortgage was notice to all subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm; and parol proof was admissible to identify the particular cattle. *Mattingly v. Darwin*, 23 Ill. 618; *Hartford Fire Ins. Co. v. Hadden*, 28 Ill. 260.

As the mortgagor testified to no fact, except the foregoing, it was manifestly improper, against repeated objections, that the court should have permitted a lengthy examination of the witness by the opposite party in regard to matters not adverted to in the examination in chief, and wholly disconnected therewith. The examination was extended to the consideration for the mortgage; the state of accounts between the mortgagor

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and appellee, and admissions which the mortgagor had made subsequent to the execution of the mortgage.

Though there are authorities to the contrary, the rule established in this State is, that when one party introduces a witness and examines him, the cross-examination is limited to the facts elicited by the examination in chief. If his testimony is desired as to other and distinct matters, the opposite party must call him, and make him his own witness. *Stafford v. Fargo*, 35 Ill. 481.

While we might not reverse for this only, we must when the examination was carried to the extent it was in this case.

By the violation of this rule, evidence was obtained which was inadmissible, and which probably influenced the verdict.

The testimony as to the fact of the purchase of the cattle, was equally balanced. The mortgagor denied, upon this improper examination, the sale; the purchaser affirmed it. The court then permitted other witnesses to contradict the mortgagor as to admissions he had made after the execution of the mortgage, and thus the scale was turned, and the rights of the mortgagee imperiled.

The mortgagor was not a party to the record, and his admissions could not be proved to affect whatever rights the mortgagee had acquired. *Reed v. Nixon*, 48 Ill. 323; *Gridley v. Bingham*, 51 Ill. 153.

The mortgagor had made a conditional sale. He had virtually parted with his interest in the property, and it would open the door to the basest frauds to allow his declarations to defeat the claim of the mortgagee. *Miner v. Phillips*, 42 Ill. 123.

The mere fact that the indebtedness mentioned in the mortgage was greater than the actual indebtedness, is not conclusive evidence of fraud. The fraud must be determined by the jury from all the circumstances; the intent and agreement of the parties, if any existed, as to the purpose of the mortgage. If the design was to shield the property, and to hinder and delay creditors by the insertion of the large amount in the mortgage, then it was fraudulent and void.

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The transaction must be real, and entered into in good faith, to secure against present or future liability. *Wooley v. Fry*, 30 Ill. 158.

We perceive no error in the instructions to which objection is made; but the judgment must be reversed for the reasons assigned, and the cause remanded for another trial.

Judgment reversed.

CHRISTINA WOLF

v.

CATHARINE BOLLINGER.

1. *WILL—alteration—new attestation required to give effect to.* A testator, after the publication of his will, sent for the executor and custodian of the same, and informed him that he wished to alter his will so that A should have a tract of land devised therein to B, and the executor, at the instance of the testator, cancelled the name of B by drawing a line through it with a pen, leaving the name still legible, and interlined over it the name of A, so that the devise read as to A; but the will, as altered, was never republished, or attested by two witnesses in the presence of the testator: *Held*, that in favor of A, for want of attestation, the will, as altered, was wholly inoperative.

2. *WILL—revocation.* The mere act of cancellation, erasure, or obliteration, will not constitute a valid revocation of a will, unless done with intent to revoke. Although every act of cancellation imports *prima facie* that it is done with intent to revoke, this presumption may be rebutted by the accompanying circumstances.

3. *WILL—revocation—presumption.* When a testator makes an alteration in his will by erasure and interlineation, or in any other mode without authenticating the same by a new attestation in the presence of witnesses, or other form required by the statute, it will be presumed that the alteration was intended to be dependent upon the alteration taking effect as a substitute; and when such alteration fails to take effect, the will will stand as originally drawn, so far as the same is legible after the attempted alteration.

4. *SAME.* Thus when a testator directed the erasure of the name of a devisee, and the interlineation of the name of another person, with intent not to revoke the devise itself, but simply to substitute another devisee in place of the original one, which was done by drawing a pen through the

62 308
101 118
52a 249

62 368
163 147
163 345
61a 70

62 368
166 245

62 368
L99a 1557

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original name, but still leaving it legible, and the alteration failed for want of a new attestation: *Held*, that the erasure of the name of the original devisee did not amount to a revocation of the devise to her.

5. *WILL—contest in chancery—party.* Under the sixth section of the statute of wills, a devisee may contest whether or not certain portions of a will, as admitted to probate, is the will of the testator. The right is given to "any person interested," and these words may embrace a devisee as well as an heir-at-law.

6. *SAME—trial by jury.* On bill in chancery to contest the validity of an alleged devise, where there is no disputed question of fact to be found, it is not erroneous to hear the cause without submitting an issue to a jury. Proceeding to a hearing without objection, or asking for an issue to be made and tried by a jury, will be a waiver of the right to a trial by jury.

7. *EQUITY JURISDICTION—contest of will.* The power conferred upon courts of equity by the sixth section of the statute of wills to determine whether a writing admitted to probate, be the will of the testator or not, includes the power to adjudge upon the validity of any part of the instrument as well as the whole.

8. *SAME—extent of relief, on contest of will.* Where a testator altered his will after its attestation by attempting to obliterate the name of a devisee, and having another name interlined as a substitute therefor, but failed to have the will, as altered, attested according to law, and the same was admitted to probate in its altered condition: *Held*, on bill in chancery by the original devisee to contest the right of the substituted devisee, that equity had jurisdiction not only to declare that one party was not the devisee, but also to establish the will in favor of the original devisee whose name was still legible, and thus settle the entire question by determining which of the two parties was entitled to take as devisee.

APPEAL from the Circuit Court of Madison County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The opinion sufficiently states the case.

Mr. DAVID GILLESPIE, for the appellant.

Messrs. METCALF, IRWIN & KROME, for the appellee.

Mr. JUSTICE SHELTON delivered the opinion of the Court:

On the 2d day of February, 1868, Jacob Bizer duly executed his last will and testament, wherein Catharine Bollinger, the appellee, was made the devisee of a certain forty acres of

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land. A few weeks afterward, the testator sent for Frederick T. Krafft, the executor named in the will, and informed him that he wished to alter the will so that Christina Wolf, the appellant, should take the forty acres instead of Catharine Bollinger; and at his instance, Krafft cancelled the name of Catharine Bollinger in the will, by drawing lines through it with a pen, leaving the name still legible, and interlined over it the name of Christina Wolf, so as to make the will read as a devise of the forty acres to her. After being so altered, the will was never republished, the two attesting witnesses whose names appear to the will, not being present at the time of the alteration, and the will never having been attested by any witness afterward in the presence of the testator.

After the death of Jacob Bizer, the will, in its altered condition, was admitted to probate.

The bill in this case, after setting forth the facts, and alleging that the instrument in writing, so altered and admitted to probate, was not the last will and testament of Jacob Bizer, but that said instrument in writing, as originally drawn up and executed, without said alteration, was his true last will, prayed that the instrument in writing, as admitted to probate, be declared null and void; and that the instrument, as originally drawn up and executed, be established as the true will of the testator, and that his estate be distributed among the devisees therein according to its provisions. The court below decreed that the probate of the instrument in its altered condition be set aside, and declared the instrument, as originally executed and published, to be the true and only last will of the testator; and that Catharine Bollinger was the sole devisee of the said forty acres of land; and that Christina Wolf be forever barred from setting up any claim thereto, inconsistent with the decree.

The first question raised by the appellant is, that the court below had no jurisdiction of the case as set forth in the bill.

As to entertaining a bill to contest the validity of a will admitted to probate, the court derived its authority to do so from an express provision of the statute, contained in the sixth sec-

Opinion of the Court.

tion of the chapter of wills, as follows: "That if any person interested shall, within five years after the probate of any such will, testament, or codicil, in the court of probate, as aforesaid, appear, and, by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate, as aforesaid, shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the State, or *non compos mentis*, the like period after the removal of their respective disabilities. The effect of the probate and recording of the will is declared, in the second section, to be "good and available in law for the granting, conveying, and assuring the lands, tenements, and hereditaments, annuities, rents, goods and chattels therein and thereby given, granted, and bequeathed."

We see no reason for confining this privilege of contesting the validity of a will to heirs-at-law, as it is claimed in argument it should be. The right is given to "any person interested," which may embrace a devisee, as well as an heir-at-law.

It is said that, under this sixth section, the issue is to be, whether the writing produced and probated is the will of the testator or not; that the instrument can only be passed upon as a whole, and that the court can not adjudge a part to be, and a part not to be, the will of the testator. But this is a distinction which is only verbal; it does not exist in reason.

The power to try and determine whether the writing produced be the will of the testator or not, includes the power to adjudge upon the validity of any part of the instrument, as well as the whole.

It is claimed as error, that an issue at law was not made up whether the writing was the will of the testator or not,

Opinion of the Court.

and tried by a jury, as required by the statute. There was no disputed question of fact in the case, upon which the conscience of the chancellor needed to be informed; the only question made was one of law. The defendant proceeded to a hearing without objection and without asking that an issue at law be made up and tried by a jury—that was a waiver of the making up and trial by jury of such an issue.

But it is insisted that, at most, the court had no further authority than to determine whether the instrument, as probated, was the will of the testator or not, and that it had no power to establish the instrument, as originally drawn and executed, without alteration, as the true will.

It is certainly an old head of chancery jurisdiction to establish the validity of wills. Story's Eq. Ju. § 1443 *et seq.*, and notes; Adam's Eq. 535.

The true contest was, as to which one of two persons was the devisee under the will; and it would fall short of administering a full measure of relief to declare that the one was not, and leave it undetermined, to be adjudged in a further suit, may be, whether the other was a devisee. Both parties being before the court, it best consists with convenience and the rule of chancery practice, that the entire question as to their opposing claims to the devise of the land, should, as between themselves, be put to rest, and that it should be settled which one of them was the devisee.

Furthermore, the original will, as unaltered, might be revived on the ground of accident in cancelling the name of Catharine Bollinger.

We come now to the main question in this case—the effect of this alteration of the will.

As to Christina Wolf, it is clear the alteration had no legal effect whatever.

There is no pretense, that after the alteration was made by the interlineation of her name, the will was attested in the presence of the testator by two witnesses; and there was distinct proof that it was not. Hence, for want of a compliance with this statutory requirement, the instrument

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did not operate as a disposing will as to Christina Wolf. Had the alteration any legal effect as to Catharine Bollinger?

Before the alteration, the will contained a valid devise to her of this forty acres of land. It is the rule that a valid will, once existing, must continue in force, unless revoked in the mode prescribed by statute; which, by the fifteenth section of our Chapter of Wills, is as follows:

“No will, testament, or codicil shall be revoked, otherwise than by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, by his direction and consent, or by some other will, testament, or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament, or codicil in writing, executed as aforesaid in due form of law.”

The only mode of revocation of this devise to Catharine Bollinger, that can be claimed in this case, is by cancellation or obliteration. Lines were drawn with a pen through her name as devisee, leaving it still legible, and the name of Christina Wolf was interlined above it. It has been often determined, in the construction of similar statutes, that the mere acts named, of cancellation or obliteration, will not constitute a valid revocation, unless done with the intent to revoke. And although every act of cancelling imports *prima facie* that it is done with the intent to revoke, it is but a presumption, which may be repelled by accompanying circumstances.

The intent of the testator, as expressed by himself, when he directed the cancellation to be made, was, “that Christina Wolf should inherit the forty acres instead of Catharine Bollinger.” The cancellation was not made with intent to revoke the devise to the complainant simply, but with intent to substitute in her stead the defendant, Christina Wolf, as a devisee. The cancellation of the name of Catharine Bollinger, was but as a means toward the effecting of the end of such substitution; and the ultimate object of substitution

Opinion of the Court.

having failed of accomplishment, the cancelling, which was done only in the view of, and in order to effect, that object, should be esteemed for nothing, and be considered, not as having been made absolutely, but only conditionally, upon the attempted substitution being made effectual. To give it effect under the circumstances, would seem to be to thwart the intention of the testator, and make him intestate as to this piece of land, when he manifested the contrary intent by his will. It can by no means be said to have been the intent of the testator, that in case Christina Wolf was not substituted as devisee, Catharine Bollinger should not take the devise, or that as between the latter and his heirs-at-law, he preferred that they should have the land. The original intention of the will certainly was to make her a devisee; it appears to have been changed no further than in order to effect the substitution of another devisee in her place; that purpose having failed to become perfected, the original intention to devise to Catharine Bollinger must be considered as remaining unchanged.

It is believed to be the doctrine, as laid down in Redfield on Wills, 314, 325, 327, and well settled by the authorities, that where the testator makes an alteration in his will, by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute; and such alteration not being so made as to take effect, the will, therefore, stands in legal force, the same as it did before, so far as it is legible after the attempted alteration. *Short v. Smith*, 4 East, 417; *Jackson v. Holloway*, 7 J. R. 394; *Laughton v. Atkins*, 1 Pick. 535.

The award of costs against Christina Wolf, which is complained of, was a matter of discretion with the court, with the exercise of which we see no reason for interference.

Perceiving no error in the record, the decree of the court below is affirmed.

Decree affirmed.

Syllabus.

BERNARD FOWLER

v.

EMORY FAY *et al.*

1. **RIGHTS OF MORTGAGEE**—*purchasing fee from mortgagor—as against intermediate incumbrances—merger.* In 1866 A & B mortgaged certain lots held by them in severalty to C to secure the payment of a note of \$2,912.37, and C being indebted to D & Co. assigned to them this note and mortgage as collateral security. In September, 1868, A mortgaged his part of the same lots to F to secure a debt of \$1,000, owing from A & B. In December following A & B by warranty deed conveyed the mortgaged lots to C for the expressed consideration of \$8,000. This deed was expressed to be subject to the mortgage to F, but contained no provision that the grantee should pay off such mortgage: *Held*, that the effect of the deed from the mortgagors to C was not to merge the first mortgage in the fee so far as the rights of C were concerned; and that upon foreclosure and sale, the sum due on the mortgage to C was the prior lien and should be first paid; secondly, the junior mortgage, and the surplus arising from the sale after satisfying both mortgages should be paid to C.

WALKER, SCOTT, and SHELDON, J. J., dissenting.

2. **MERGER.** Courts of equity will not apply the technical doctrine of *merger* where the intention or the just interests of the parties require the incumbrance to be kept alive. Where it is perfectly indifferent to the party in whom the interests are united, whether the charge should or should not subsist, it will sink, but where it is to his interest that it should be kept on foot, the court, in the absence of an expressed intention, will so decree.

3. **PURCHASE**—*subject to incumbrance—rights of parties.* Where a party receives a warranty deed containing a clause that it is made subject to a mortgage given upon the land by the grantor to a third party, this will create no personal liability on the part of the grantee to pay the outstanding incumbrance, unless he has specially agreed to do so, or the amount of the incumbrance has been deducted from the purchase price. The effect of such clause is to make the land the primary fund as between all the parties for the payment of the debt.

4. **MERGER.** If a senior mortgagee should purchase the mortgaged premises from the mortgagor and undertake to pay off a junior mortgage, and the amount of such mortgage is deducted from the price of the land, then the senior mortgage will be postponed in favor of the junior.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

62	376
121	137
62	375
158	558
62	375
58a	203
62	375
106	370
62	375
180	145
62	375
98a	*325
62	375
191	*111
62	375
209	*411
62	375
213	*396

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Mr. O. T. REEVES, for the appellant.

Messrs. McNULTA & McNULTA, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

On the 19th of February, 1866, Fay and Lord executed to Ives a mortgage upon certain real estate in the city of Bloomington to secure the payment of a note for \$2,912.37.

On the 29th of December, 1867, Ives, being indebted to McClure, Holder & Co., assigned to them this note and mortgage as collateral security.

On the 30th of September, 1868, Fay and Lord being indebted to Fowler in the sum of \$1,000, Fay executed to him a mortgage, to secure said debt, on that portion of the premises included in the preceding mortgage which belonged to Fay.

On the 8th of December, 1868, Fay and Lord conveyed to Ives, by deed of general warranty, for an expressed consideration of \$8,000, all the mortgaged premises, and gave him possession. The deed expressed upon its face that it was made subject to the Fowler mortgage, but contained no provision that that mortgage should be paid by the grantee.

Fowler filed a bill to foreclose his mortgage, making McClure, Holder & Co. parties, and they filed a cross bill to foreclose the mortgage executed to Ives and assigned to them.

The court decreed a foreclosure and sale, and that the entire amount due upon the Ives mortgage, according to its terms, should be first paid.

From this decree Fowler appeals, claiming that the Ives mortgage was entitled to precedence only to the extent of the debt due from Ives to McClure, Holder & Co., which was considerably less than the face of the mortgage, and for which they held the mortgage as collateral security. It is claimed by counsel for appellant, that so far as Ives retained an interest in the mortgage it was merged by the absolute conveyance of the mortgagors to him. The question presented by the record is as to the effect of that deed.

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It has long been the rule with courts of equity that they will not apply the technical doctrine of merger where the intention or the just interests of the parties require the incumbrance to be kept alive. In *Forbes v. Moffat*, 18 Ves. 390, Sir William Grant states as the principle to be drawn from all the cases, that where it is perfectly indifferent to the party in whom the interests are united, whether the charge should or should not subsist, it would sink; but when it was for his interest that it should be kept on foot, the court, in the absence of an expressed intention, would so decree.

In the case before us, no intention is expressed upon the face of the deed that the mortgage should sink, nor is there any thing in the circumstances of the case which requires such an intention to be imputed to the parties upon equitable grounds. On the other hand, it is important to the protection of the just rights of the first mortgagee, that his mortgage should be kept alive. If proof had been made, showing that, in the sale of the premises to Ives, he had undertaken the payment of the Fowler mortgage, and the amount of that mortgage had been deducted from the price of the land, the Ives mortgage should be postponed in favor of the junior incumbrance. Such was the case in *Halsey v. Reed*, 9 Paige 452. But no evidence was offered on this point, and the only ground upon which it can be claimed that such was the understanding of the parties, is the clause in the deed to Ives, reciting that it was made subject to the Fowler mortgage. But it was decided by this court in *Comstock v. Hitt*, 37 Ill. 546, that such a clause in a deed creates no personal liability on the part of the grantee to pay the outstanding incumbrance, unless he has specially agreed to do so, or the amount of the incumbrance has been deducted from the purchase price. The effect of the clause, it was there said, was merely to make the land the primary fund, as between all the parties, for the payment of the debt.

If, in the case before us, we were to hold the elder mortgage merged, our decree would be substantially as inequitable as if we were to hold that this clause in the deed had created a personal obligation on the part of Ives to pay the Fowler

Opinion of the Court.

mortgage. Such a decree would compel Ives to pay in order to save his own mortgage, even though the amount due on his mortgage should equal the value of the premises.

Certainly there are no equitable considerations that would justify such a decree. It can not be demanded on behalf of Fowler, for he has done nothing to entitle him to any better position than that he assumed when he took his mortgage. He took it as a junior incumbrance, and can not complain because he is not permitted to supplant the senior mortgagee. Neither can such a decree be claimed as an act of justice to the mortgagors. By the clause inserted in their deed to Ives, they saved themselves from liability on their covenants in case the premises should be sold on the Fowler mortgage, and made the land the primary fund, as between themselves and Ives, for the payment of the Fowler debt, but they did nothing more. Both the mortgages were, so far as this record discloses, kept in force. The note and mortgage to Ives had been assigned by him, and, to the extent of the lien of the assignee, were beyond his control.

The conveyance of the fee so far merged the mortgage, at law, that the grantors would not be liable, under their covenants, on the senior mortgage, and the clause in the deed saved them from liability on the Fowler mortgage. The land was thus made, as said in *Comstock v. Hitt, supra*, the primary fund for the payment of this debt. Ives has the paramount interest in the premises to the extent of his mortgage. Then comes the junior mortgage. If the mortgaged premises equal in value only the senior mortgage, Ives should have the right to purchase under his mortgage. If they exceed that mortgage in value, the mortgagors can bid at the sale and make the property bring an amount sufficient to pay both mortgages, and they can take the title, in case they should become the purchasers. They can thus make the property the primary fund for the payment of the incumbrances, and relieve themselves from personal liability, while Ives can choose between the relinquishment of his property on the payment of his mortgage, or retaining it by becoming the highest bidder at the sale, having the

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proceeds applied, first, on his own mortgage, and, secondly, on that of Fowler, the surplus, if any, to be repaid to him. This does justice to all parties, and was the decree of the circuit court.

Decree affirmed.

Justices WALKER, SCOTT, and SHELDON, dissent.

JESSE H. FISHER

v.

ALLEN H. DILLON.

62 379
59a 273

1. **MORTGAGE**—*subrogation—right of one of two mortgagors paying for the other.* When A and B, being equally interested in the purchase of land, gave their joint notes for the unpaid purchase money, secured by their mortgage on the premises, and B refused to pay \$800 of his part of the last note, so that the land of A (a partition having been made) was sold under decree of foreclosure, and he was compelled to redeem the same: *Held*, on cross bill of A, to a bill filed by B, that A was entitled to a decree against B for the amount so paid by him of B's part of the note, with six per cent interest.

2. **FRAUD**—*misrepresentation as to value.* Where a party, before purchasing an undivided half of a tract of land, went upon it to satisfy himself of its situation and value, and after its partition with the defendant, the owner of the other half filed his bill in chancery, alleging that the defendant had falsely represented that the half set apart to him was of less value than the other half: *Held*, that as the complainant had seen the land, though he had not gone over it with a view to have it divided, he could not be heard to say that he relied on the representations of the comparative value of the two parts thereof, and that it would be presumed he acted upon his own judgment.

3. **SAME.** In such case, a statement of the relative value of two portions of a tract of land, with a view to a division between the owners, will be regarded simply as an expression of opinion as to value.

4. **SAME**—*division of land.* Where the land of two joint owners is divided by the parties without either knowing which part he will receive as his share, it will be presumed that the division was fairly made, or as nearly so as the parties were able to make it.

Opinion of the Court.

APPEAL from the Circuit Court of McLean County; the Hon. S. L. RICHMOND, Judge, presiding.

Messrs. HATCH & SLADE, for the appellant.

Messrs. WELDON & BENJAMIN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In the month of November, 1865, appellee, by contract in writing, purchased of one Anderson the south-west quarter of section thirty-six, township twenty-two north, range one west of the third principal meridian, at forty dollars per acre. He paid five hundred dollars on the purchase and gave his notes, due on time, for the balance. By the terms of the agreement appellee was to forfeit the five hundred dollars paid if he should not pay the first note when it matured, and the other notes given on deferred payments were to become due by reason of the default in such first payment.

Subsequently, and before the first note fell due, appellee found he would be unable to meet it promptly, and applied to different persons to borrow the money, but failing to succeed he applied to and urged appellant to advance one half of the purchase money and become an equal owner of the property, and he accepted the proposition and thus became a purchaser, and the contract was changed so as to show that appellant and appellee were purchasers. The note first falling due was paid by the parties, and the other two notes were taken up and their joint notes substituted for them, and a mortgage was given on the land to secure their payment. There was a condition that if the first of these notes was not paid when due, the others should then become due. Anderson, at the same time, executed to them a deed for the land. They, at the same time, divided one hundred and twenty acres of the land, appellee taking the south half and appellant the north, and released to each other the portion each had received on the division.

The parties paid the first note at maturity. But appellant

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refused to pay half of the second note, being the last payment, but deducted from his half eight hundred dollars, and paid the balance of his half. Thereupon Anderson foreclosed the mortgage, and appellant subsequently redeemed, paying the eight hundred dollars unpaid on appellant's half of the note. In the meantime one forty acres of the land had been laid off in town lots before the division was made, and the lots were divided at the same time that the one hundred and twenty acres were.

Prior to the foreclosure, in February, 1868, appellant filed a bill in chancery, alleging that appellee had falsely represented that he had paid one Merriam sixteen hundred dollars for an interest he had in the land, and alleging that the south half of the one hundred and twenty acres was worth more than the north half. After redeeming, appellee filed a cross bill setting up the sale and redemption. On the hearing the court found that there was due from appellant eight hundred dollars, with six per cent from the time the last note fell due, amounting to eight hundred and eighty-five dollars and eighty-seven cents, and dismissed the original bill. Appellant has brought the case to this court by appeal, and asks a reversal.

Appellant alleges that he was not acquainted with the land at the time the division was made, and had relied upon the representations of appellee, and that the portion he got was of less value than the half appellee received. It is no doubt true that the parties did not go over the land with a view to its being divided. But the preponderance of the evidence shows that when considering whether appellant would purchase he was upon the land for the purpose of seeing it, and must have seen it so as to become satisfied with its situation and value. This being true, he can not be heard to say that he relied upon the representations of appellee, as we must presume that he exercised his judgment and formed his opinion as to value on his knowledge of the land. If appellee made statements as to the comparative value of the two tracts, such an expression would be referred to mere opinion. It was not a statement as to its location, quality, or other circumstances affecting the property, but simply as to its value, and upon

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which the opinions of persons would be extremely liable to differ.

Again, the preponderance of the evidence establishes that appellant was to have the choice in the division of the town lots and appellee of the two tracts of the land. If the property was previously divided by the parties without either knowing which was to have a particular share, the natural presumption would be that it was fairly made, or at least as nearly so as they were able to make it. That would have been the interest of both, as no possible motive can be perceived for either to desire an unequal division when he was liable to get the least valuable part as his co-tenant. We think the evidence sustained the decree on this question.

But it remains to inquire whether appellee practiced a fraud in selling the half of the premises to appellant. He insists that appellee represented that he was to pay Anderson forty dollars per acre, and had paid Merriam ten dollars an acre, and that on that representation he purchased, agreeing to pay half of the amount the land would come to at those rates; or, in other words, fifty dollars, when appellee had paid Merriam nothing; but Anderson had purchased the claim before selling the land. The papers were all executed on the basis that fifty dollars per acre was the price. And appellee and his daughter state that appellant agreed to pay fifty dollars an acre to become a partner, without reference to any claim that Merriam ever held. And another witness swears that appellant stated it cost him fifty dollars per acre. Appellant swears, in direct contradiction to appellee, that the ten dollars an acre was a part of the consideration of the purchase, and is supported by his son. But the evidence of the latter is greatly impaired in its weight by the fact he admits that appellee said he had collected of Merriam the full amount that he owed him, and which it is claimed appellee represented he had paid for his claim. The brother of appellant swears that he heard a conversation, in which he understood the parties to say that they had paid Anderson forty dollars per acre, and appellee had purchased Merriam's claim, and appellant

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was to pay eight hundred dollars as his half of that sum. But he states that his recollection is not distinct, and he is contradicted flatly by appellee.

While the evidence is inharmonious and not free from doubt as to where the truth lies, we are, nevertheless, of the opinion that it is in favor of appellee. Appellant's evidence as to the fact whether he was on the land is contradicted, and we think it is clearly proved he was on the land, and had examined it before it was divided. Again, he is contradicted when he denies that there was an agreement that he was to have choice of the lots and appellee of the land. We think that the evidence, all considered, proves satisfactorily that such was the agreement. And this greatly impairs the weight that would otherwise attach to his evidence. We can see that in a transaction like this, conversations in reference to other matters apparently relating to the land could readily lead to misapprehension. Again, it would hardly seem probable that appellee would make such a representation when its falsity could be so easily detected.

Again, there seems to be no doubt that appellant was satisfied with the land and the price he was to pay, when he purchased. Nor is there any pretense that the land was not worth the price he paid. From all of the evidence in the record, we are unable to say that it does not sustain the decree. And appellant not having shown that there is error in the decree, it is affirmed.

Decree affirmed.

AMOS H. COX

v.

J. W. STRAISSER.

1. COMMON COUNTS—*goods sold*. In a suit upon a note purporting to be executed by A and B, there was no service or appearance by A. B denied the execution of the note, verified by his oath, and the proof showed that he never did execute it. The proof further showed that the payee of the

Syllabus. Statement of the case.

note sold A a mare on condition that B would sign a note with A to him for the price, and that B had said he would sign it: *Held*, that this was not an original undertaking of B for the purchase and payment of the mare, and that plaintiff could not recover the price of the horse of B under the common counts.

2. *PRACTICE—jury taking evidence in their room.* Where a hotel register was given to the jury by consent, in order to prove the handwriting of defendant by comparison with the signature of the note sued on, and examined by the jury: *Held*, no error to refuse to permit the jury to take the register in their retirement, as it was not evidence of itself.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

The facts of the case are substantially stated in the opinion of the court. The court, on behalf of the defendant below, instructed the jury:

1. The court instructs the jury for defendant, that the plaintiff must prove his case by a preponderance of testimony; and unless the plaintiff has proved, by a preponderance of testimony, that defendant signed the note in evidence, they will find for defendant.

2. The court instructs the jury for defendant, that even if they believe, from the evidence, that Straisser agreed to sign a note to Cox as security for Johnson for the payment of a horse, yet, if they further believe, from the evidence, that Straisser never did sign such note, then they will find for the defendant.

3. And even if the jury believe, from the evidence, that Straisser agreed to become security to Cox for the payment of a horse sold to Johnson, yet, unless such agreement was made in writing, it does not bind the defendant.

Messrs. STRAIGHT & STRAIGHT, for the appellant.

Messrs. WILLIAMS & BURR, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, in the McLean circuit court,

Opinion of the Court.

on a promissory note, with the common counts; the note purported to be signed by Samuel Johnson and J. W. Straisser; Straisser put in a plea of non-assumpsit, sworn to, and a special plea that he did not execute the note, which plea was also sworn to.

Issues were joined on these pleas, and there was a trial, and verdict for the defendant Straisser. Process was not served on Johnson, nor was there any appearance by him.

The court rendered judgment on the verdict, to reverse which the plaintiff appeals.

There was proof sufficient to satisfy the jury—as it does us—that Straisser did not execute the note.

The leading facts are, that the plaintiff went to Straisser's to buy some hogs, where he found Johnson; a conversation was started about a horse plaintiff had to sell, and he said he had a gray mare he would sell, and if satisfied it was secure, and he could sleep on it, he would sell on a year's time; Johnson asked him if he would take a chattel mortgage, and, being answered he would not, there was some conversation between Straisser and Johnson, which plaintiff did not hear; Johnson asked Straisser if he would sign the note; he unhesitatingly said he would; Johnson then said if the mare was as good as when he last saw her he thought she was worth the price, and they would take her; plaintiff told Johnson he would examine her, though he himself would be absent from home for several days—could not tell how long. Straisser then said to the plaintiff if Johnson got around before he (Straisser) delivered the hogs to let Johnson have the mare, and when he (Straisser) came with the hogs he would bring the note, and if he (Johnson) did not get around by that time, or before, he (Johnson) could take the note down, and asked if that would do; the plaintiff told him it would, and that he would leave word with his family to let them take the mare if she suited; Straisser did not take the note down; when he delivered the hogs the plaintiff was not present.

The above is the substance of the testimony of the plaintiff, and of his son John.

Opinion of the Court.

The defendant Straisser, testified he did not sign the note; that his name is not to it—he has no middle name; he never signed his name J. W. Straisser. The conversation spoken of by plaintiff was on Friday, the 27th of November, 1868; he took the hogs down the next week; plaintiff came to his house to buy hogs on that day; Johnson was there inquiring of him if he had a horse to sell, when plaintiff said he had a gray mare he would sell; Johnson then called him to one side and wanted him to sign the note and he would give witness a chattel mortgage on the team and two cows; Johnson then went to plaintiff and told him what witness said after this talk; the plaintiff then said, if you make up your mind to go his security, you can make out the note and bring it down when you bring the hogs; witness replied, if he made up his mind to sign the note, he would bring the note down when he brought the hogs; when he took the hogs down John Cox, the son of plaintiff, asked him if he had brought the note down; he replied he had not, as he would not go Johnson's security. The team spoken of was to be composed of a horse Johnson had, and plaintiff's mare, if he got her; defendant swears he told John Cox he would not sign the note; he is sure he did not sign it. John Cox, on being recalled, says when defendant delivered the hogs he was there; his father was not; there was nothing said about the note; defendant never told him he had concluded not to sign the note; there was nothing said by defendant at the time of the bargain for the mare about his letting his father know if he concluded not to sign the note; there was no such conversation.

In this conflict of testimony it was the province of the jury to reconcile it the best way they could. There is one fact which seems to strengthen the defendant, and that is, when he brought the hogs to plaintiff, Johnson had not been there, and he brought no note; this was a warning to the plaintiff that the note was not executed by him, and delivering the mare afterward to Johnson was at plaintiff's risk.

The proof of handwriting was very unsatisfactory, and not calculated to produce a conviction that the defendant had sworn

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falsely ; one prominent fact makes very much in his favor, and that is, his name ; it is John Straisser, and the note is signed J. W. Straisser ; his testimony was corroborated by several others, who testified, in their judgment, having seen him write frequently, that the signature to the note was not that of the defendant.

The only testimony to establish the handwriting was that of a hotel-keeper, named Shepherd, who testified that he was acquainted with the handwriting of defendant, and thought the signature to the note was his, but was not positive.

Appellant complains that the instructions given for defendant, numbered one, two, and three, were erroneous. The objection to number one is, that it excluded all evidence in support of the common counts, from the consideration of the jury, and the second is liable to the same objection, and the third also.

The instructions could have done the plaintiff no harm by reason of the total want of evidence to sustain any of the common counts. There is no proof showing that defendant's undertaking was an original undertaking for the purchase and payment of the mare. This can not be pretended.

The only agreement the jury could have possibly found as proved, was that defendant said he would sign the note. But he did not sign it.

Another objection is, that the court refused to permit the hotel register to be taken by the jury in their retirement. This register was not evidence of itself, but became so by consent of the defendant, and it was examined by the jury and was presented by the plaintiff in order to prove the signature by a comparison of handwriting. It was not a paper read in evidence, in view of the statute and the decisions of this court.

The court on behalf of the plaintiff:

3d. The court further instructs the jury, that if they believe, from the evidence, that the defendant in this cause agreed to become security for the payment of the purchase money of the horse sold by plaintiff, and that the credit was, in fact,

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given to Straisser, and on the strength of said agreement of Straisser, the plaintiff delivered the horse to Johnson, then you will find for the plaintiff.

This instruction, we think, was quite as favorable to the plaintiff as he could expect, and covered fully all claims on the common counts.

We do not see any error in the record, and must affirm the judgment.

Judgment affirmed.

CHARLES VAN HORN *et al.*

v.

CALEB C. BURROUGHS *et al.*

1. ACTION—*before expiration of conditional credit.* When the plaintiff performs work for a defendant under a contract to give a certain time for the payment of the price, upon condition that defendant will give his note bearing a certain rate of interest on the completion of the work, which he refuses to do, the price will become due upon the completion of the work, and suit may be brought before the expiration of the proposed credit.

2. PLEADING—*where plaintiff must declare specially.* Where goods are to be paid for by bill of exchange, or promissory note, and the defendant has refused to give it, if the suit is brought before the expiration of the credit, the plaintiff should declare specially.

3. But where work is done under an agreement to extend the time of payment to a given time, upon condition that a note shall be given bearing interest, upon the completion of the work, a failure to give the note will authorize the bringing of suit at any time thereafter, and in such case the plaintiff need not declare specially.

4. INSTRUCTION. Where there is any evidence bearing upon a question it is not error to give an instruction based upon the fact sought to be established by such evidence. The weight of the evidence is a question for the jury.

5. EVIDENCE—*credit by mistake in account.* Where the plaintiff, in the copy of his account filed with his declaration, by mistake had given de-

Syllabus. Opinion of the Court.

defendant a credit of one hundred dollars, and defendant knew some time before the trial that the credit was claimed to have been made by mistake: *Held*, no error to allow the plaintiff on the trial to explain the credit

APPEAL from the Circuit Court of Macon County; the Hon. ARTHUR J. GALLAGHER, Judge, presiding.

Messrs. EDEN & ODER and Messrs. NELSON & ROBY, for the appellants.

Messrs. CREA & EWING, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It is sought to reverse the judgment in this cause on two grounds, first, that the court erred in refusing and giving instructions, and, second, that the court erred in admitting improper evidence.

The instructions given at the instance of the appellee, to which exceptions were taken, state, in substance, that if the plaintiff agreed with the defendants that the defendants should have till the first day of August, 1870, in which to pay for the work and labor done at their request, provided the defendants, on the completion of the work, would give their note bearing interest, and the defendants, when requested, refused to give their note, then the plaintiffs had the right to institute a suit for the price and value of their work before the first day of August.

The instruction asked by the appellants, which the court refused to give without a modification, asserts the principle, that if any part of the plaintiff's claim would not become due till the first day of August, 1870, by the agreement of the parties, and that the defendants agreed to give their note to the plaintiffs, bearing a certain rate of interest, and afterward refused to give such note, yet the plaintiffs could not recover on the common counts for refusal to execute such note. The qualification added to this instruction by the court made it conform

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to the principles stated in the instructions given for the appellees above referred to.

It is first objected that the hypothetical case stated in the instructions given for appellees, does not exist in the evidence, or, in other words, that there is no evidence upon which such instructions could be properly based.

Upon inspection of the record we find that there is some evidence on the question stated in the instructions, and that is sufficient to answer the general rule that instructions should be based on the evidence. What weight should be given to that evidence was a question for the jury and not for the court.

It is further objected, that if credit to a certain day was to be given for the work done, and the appellants agreed to give their note, and afterward refused to execute and deliver the note, that would not authorize the appellees to recover on the common counts. We do not think that this objection is at all strengthened by the allusion to the common law principle, that if goods were to be paid for by bill of exchange or promissory note, and the defendant refused to give it, the declaration should be special. 1 Chitty Pleading, 347.

That principle is not applicable to the facts in the case before us. In this case no credit was contracted for or given, except upon condition that the appellants would give their note bearing a certain rate of interest. Having failed to give the note, no credit in fact was given, and hence the work was to be paid for as soon as completed, and the suit could properly be instituted at any time after the completion and delivery of the work. The evidence will bear this construction, and it is doubtless the view that the jury took of it. There was, therefore, no error in the court in modifying the instruction asked for by the appellants, or in giving those asked by the appellees.

The second error suggested, viz.: that the court erred in admitting improper testimony, we think is wholly untenable.

Under the statute, the plaintiff is not required to file with his declaration a copy of the credits to which the defendants

would be entitled on the trial, and which he might be willing to allow. It is a sufficient compliance with the statute for the plaintiff to file a copy of his account against the defendant.

It distinctly appears from the evidence that the appellants knew, some time at least before the trial, that the appellees claimed that the credit of \$100, which had been placed on their books to the credit of appellants, had been placed there by mistake, and they could not have been surprised when on the trial the appellees offered the evidence, to which objections were taken, to explain that credit. The evidence was admissible and proper, and it is not perceived how any objection could have been sustained to it.

Perceiving no error in the record the judgment must be affirmed.

Judgment affirmed.

CATHARINE WOOD

v.

COMMISSIONERS OF HIGHWAYS.

1. HIGHWAYS—*laying out*. In this case, notice of the petition to establish a road was posted October 21st. Thirty days thereafter (November 20th) the commissioners of highways met, in pursuance of notice, to hear reasons for and against the establishment of the road, and the prayer of the petition was granted and a survey ordered, which was entered of record. No final order was then made, and there was no adjournment entered to a future day. Nothing further was done by the commissioners until the 4th of December following, when the final order was made establishing the road, and on the 14th of December the damages were assessed: *Held*, on *certiorari*, that the final order was void, and that the proceedings should be quashed.

2. SAME. The statute evidently contemplates that the final order establishing a road should be made within the thirty days from the posting of the petition, unless for good cause there is an adjournment for a reasonable time, entered on the record, so that parties interested may be advised of any future meeting in relation to the road.

62	391
36a	99
62	391
196	4322

Syllabus. Statement of the case.

3. *SAME—notice of meeting.* The notice of the time and place of meeting of the commissioners to hear reasons for and against the proposed action, is in the nature of a condition precedent to any action on the part of the commissioners, and to the exercise of the power to appropriate the land of the citizen for the use of the road.

4. *SAME—adjournment.* If, at the meeting to hear reasons, of which notice had been given, the officers had entered an order for adjournment upon their records, for sufficient cause, and for a reasonable time, then they might be justified in making the final order after the expiration of the thirty days, as the land owners would then have some notice of the subsequent action.

5. This case distinguished from *Allison v. Commissioners of Highways*, 54 Ill. 170.

APPEAL from the Circuit Court of Sangamon County ; the Hon. JOHN A. McCLEARNAND, Judge, presiding.

The petition for the highway was posted October 21st ; November 20th following, the commissioners met and made the following order : " We, the commissioners of highways of Springfield, have this day agreed to grant the prayer of the within petition upon a certain route, of which we have agreed upon, and order a survey of the same as soon as practical. Witness our hands and seals this 20th day of November, A. D. 1869." (Signed by com'rs.)

Eight days' notice was given of this meeting. The final order establishing the road, and the surveyor's report, were dated December 4, 1869.

Appellant moved the circuit court to quash the proceedings of the commissioners for various reasons. The motion was overruled, and an appeal granted.

Messrs. STUART, EDWARDS & BROWN, for the appellant.

Mr. N. M. BROADWELL and Mr. WM. M. SPRINGER, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

This was a proceeding by *certiorari*, to bring before the court

Opinion of the Court.

the orders of the commissioners, in the establishment of a road; and a motion was made to quash the proceedings.

The final order of the commissioners can not be sustained, and that only we propose to notice.

The notice of the presentation of the petition was posted on the 21st of October. Thirty days thereafter would have expired on the 20th day of November succeeding. On this last day the prayer of the petition was granted, and a survey ordered. From the transcript of the proceedings, nothing further was done by the commissioners until the 4th of December, when the final order was made, establishing the road, and on the 14th day of December the damages were assessed to the land owners.

The action of the commissioners on the 20th of November was entered of record, and was in pursuance of notice that they would meet on that day to hear reasons for and against the establishment of the road. No final order was then made, no damages assessed, and there was no adjournment to a future time.

The statute evidently contemplates that the final order should be made within the thirty days from the posting of the petition, unless for good cause there is an adjournment for a reasonable time, which adjournment should be entered on the record, so that parties interested should be advised of any future meeting in relation to the road.

It is the duty of the commissioners so to act in the discharge of their duties as to secure to land owners, whose lands they are about to take, the benefit of the notice provided by the law, and that they may have all the remedies of the statute.

The only reference to time in the statute is, that the commissioners shall, within ten days after the expiration of twenty days from the posting of the petition, examine the route and hear any reasons which may be offered for or against laying out the road; and if they shall be of opinion that the road is necessary and proper, they shall grant the prayer of the petition as thereafter provided. They are then directed to

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cause notices of the time and place of meeting, to hear such reasons as may be offered, to be posted eight days previous to the meeting; and, upon determining to lay out the road, they shall cause a survey to be made, which shall be incorporated in the final order.

The notice of the meeting of the commissioners is only constructive notice to the land owner. It is, however, effectual, if the law is complied with, to enable the land to be taken for the use of the public. There is an object in the requirement of this notice. It is in the nature of a condition precedent to any action on the part of the commissioners, and to the exercise of the power to appropriate the land of the citizen for the use of the road. What is the object of the notice? It is to enable the land owner to be present at the meeting, and contest the attempt to take his property. If the determination is against him, he can take an appeal within thirty days from the filing of the order in the town clerk's office. He is bound to know the law, which requires the commissioners to act within a limited time.

If these officers can postpone the final order for fourteen days beyond the thirty days named in the law, they can make such postponement at their own pleasure, and defeat the purpose of the law in the requirement of notice.

When the reasons have been heard for and against the establishment of a road, the commissioners are prepared to act. The law, in declaring that, within ten days after the expiration of twenty days from the posting of the petition, the commissioners shall personally examine the route for the proposed new road, and shall hear any reasons for and against its establishment, manifestly intended that final action should be had within thirty days. Upon the opposite hypothesis there was no necessity for the requirement of notice; and it was folly to have limited the action of the commissioners in point of time. If, at the meeting to hear reasons, of which notice had been given, the officers had entered an order for adjournment upon their records, for sufficient cause and for a reasonable time, then they might be justified in making the final order after

the expiration of the thirty days. The land owner would then have some notice of the subsequent action.

In this case he had no notice whatever of the proceedings on the 4th day of December, and they must be held to be void.

This case, in its facts, is unlike the case of *Allison v. Commissioners of Highways*, 54 Ill. 170. In that case there had been an appeal from the orders of the commissioners to three supervisors, as provided by law; and the court held that it became a new case before the supervisors, and that the appeal, which was on the merits of the whole case, operated as a waiver of the irregularities of the commissioners. The balance of the opinion must be regarded as *obiter dicta*.

In the case at bar the omissions and irregularities of the commissioners were not waived by any act of the land owner.

We are of opinion that the proceedings of the commissioners should have been quashed, and the judgment is accordingly reversed and the cause remanded.

Judgment reversed.

THOMAS H. KENNEDY, assessor, etc.,

v.

ST. LOUIS, VANDALIA & TERRE HAUTE R. R. COMPANY.

1. TAXATION—*rolling stock of railroad company*. Under the act of April 9, 1869, entitled, "An act for the collection of railroad taxes in certain counties, cities, and towns," the persons or company operating a railroad are liable for the taxes upon the rolling stock used upon such road, without reference to the ownership of the road or the rolling stock so used.

2. SAME—*assessment—property used but not owned*. By a written agreement with the Pullman Palace Car Company a railroad company employed on its road sleeping cars of the car company, hauled the same, furnished fuel and lights, kept them in running order, and received its ordinary fare for the transportation of passengers in them. The car company was bound to

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keep in repair the carpets, upholstery, and bedding, excepting repairs necessary from accident and casualty while being run on the road; received the fare for the extra accommodation, and furnished its own employees to receive the same and wait upon passengers: *Held*, that, although the general property in the cars was in the car company, yet the railroad company had such a community of interest and such a qualified property in them for the time being, that, for the purposes of taxation, they must be regarded, under the statute, as belonging to the rolling stock of the railroad company, and subject to be taxed as such.

3. CONSTRUCTION OF STATUTES—*strict*. Statutes conferring power to impose taxes are strictly construed. But where property is chargeable with taxes, and it is simply a question of which of two companies or persons, the one having the general property and the other a qualified one and using the same, shall pay the same, no reason is perceived for the application of the rule of strict construction.

APPEAL from the Circuit Court of Madison County; the Hon. J. GILLESPIE, Judge, presiding.

Messrs. IRWIN & KROME, for the appellant.

Mr. JOHN SCHOLFIELD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

In proceeding to consider the question whether the sleeping cars in question are subject to taxation as a portion of the rolling stock belonging to the appellee, it may not be amiss to recur to the decisions of this court and the legislation of the State upon the subject of taxing the rolling stock of railroad companies.

In the case of *Sangamon & Morgan Railroad Company v. County of Morgan*, 14 Ill. 164, the rule was laid down to be that, with certain qualifications, personal property follows the residence of the owner and is there taxable; that a railroad track is real property, but that the rolling stock of a railroad company is personal property, and it was held that the residence of the Sangamon & Morgan Railroad Company must be taken to be in Sangamon County, where its principal office was, and that the rolling stock of its railroad, extending from

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Naples to Springfield, fifty-five miles, and running twenty-seven miles through the county of Morgan, could not be right-fully assessed for taxes in Morgan County.

Thereafter, in 1855, the legislature passed an act to amend the assessment and revenue laws, which contains the following provision :

“The list (the schedule which a previous section required railroad companies to return to the county clerk for assessment) shall contain an inventory of the rolling stock belonging to said company, with the value thereof; said rolling stock shall be denominated ‘personal property;’ also a statement of the value of all other personal property owned by said company in each county, city, and town.

“The length of the whole of the main track, within this State, and the total value of the rolling stock shall be set forth in said list. The rolling stock shall be listed and taxed in the several counties, towns, and cities, *pro rata*, in proportion as the length of the main track in such county, town, or city bears to the whole length of the road. All other property shall be listed and taxed in the county, town, or city where the same is located or used.”

Subsequently, the case of *Cook County v. C. B. & Q. R. R. Co.*, 35 Ill. 461, came before the court, where, it was held, in view of the above provision of the statute of 1855, that the C. B. & Q. R. R. Co., which ran its trains from Junction into the city of Chicago, twenty-eight miles of the distance in Cook County, over the track of the Galena & Chicago Union Railroad Company, under a contract of lease by which the former had agreed to pay the latter a stipulated rent for the right and privilege of using its road for that purpose, was not liable to be assessed for its rolling stock in the county of Cook; that the privilege of so running trains, according to the allegations of the bill in that case, imported no more than an easement or license, and no vested interest in the road; and that a road over which a company occasionally runs its trains

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under a mere easement or license, is not any part of its main track; at the same time declaring that it was not prepared to say that a leased road might not be a part of the main track of the lessee within the meaning of the statute.

Following this decision was the act of April 9, 1869, entitled, "An act for the collection of railroad taxes in certain counties, cities, and towns," as follows:

SECTION 1. "Whenever any railroad, or any part thereof, shall be used or operated under any lease, contract, or arrangement, by any railroad company or other corporation, person or persons, the company, corporation, person or persons, so using or operating such road shall list, in the manner now provided by law in case of railroads, the rolling stock and personal property which may be used upon such road in the counties, towns, and cities through which such road may run, whether such rolling stock belongs to such road, or to the company, corporation, person or persons using or operating such road. And all such rolling stock and personal property shall be listed and taxed in the several counties, towns, and cities *pro rata* in proportion to the length of the main track of such road in such county, town, or city, shall bear to the whole length of such road: *Provided*, That in all cases where the rolling stock of any company, corporation, person or persons shall be used indiscriminately upon the road used or operated as aforesaid, and by and upon its, his, or their road, in connection therewith, the same shall be listed and taxed in the proportion which the combined length of the main tracks of said roads in the county, town, and city through which said line or lines pass, bear to the combined length of said road."

It will thus be seen that legislation on this subject has made the rolling stock of railroads an exception to the general rule of personal property being taxable at the place of residence of the owner, and required the taxes on it to be paid *pro rata* in the several counties, towns, and cities through which the road may run. The policy of this legislation

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would be contravened in holding the Pullman Palace Car Company alone liable for the payment of these taxes.

The act last cited requires the persons or company operating a leased railroad to list for taxation the rolling stock *used* upon it, and although the present case does not come within the terms of that act, as the appellee operates its own, and not a leased road, it comes within the full spirit of the act, which is to require the rolling stock used upon railroads to be listed for taxation by those operating the roads, without reference to the ownership of the property.

Can these sleeping cars, for the purpose of taxation, be regarded as "belonging" to the appellee? They are rolling stock, and are used by appellee with its regular trains upon its road. Under the agreement in evidence, by which the cars are run upon the road, the Pullman Palace Car Company furnishes the cars, and has the exclusive right to do so for fifteen years; it keeps in repair the carpets, upholstery, and bedding, excepting repairs and renewals made necessary by accident or casualty happening to the cars while running upon the road, in which case such duty devolves upon the appellee.

The appellee is obliged to haul the cars, furnish fuel and lights, and keep them in running order; appellee gets its fare for transportation, and the car company the fare for the extra accommodation afforded by the sleeping cars—it furnishing one or more employees for each car, to receive such extra fare and wait upon passengers; such employees to be subject to the same rules and regulations adopted for the government of the appellee's own employees. Although the general property in the cars is in the car company, the appellee has a community of interest in them for the time being.

There are not unfrequently cases in the law where one having a less estate in property than that of the absolute ownership, fulfills the condition of being owner. The requirement, too, of the statute is to list, not the rolling stock which the company owns, but the rolling stock "belonging"

Opinion of the Court.

to the company. We are of opinion the appellee has such a qualified property in these sleeping cars, that, for taxable purposes, they may be regarded, within the fair meaning of the statute, as "belonging" to the rolling stock of the railroad company, and that they are subject to be taxed as forming a portion of the same. Such a construction is obviously one which tends to suppress the mischief intended to be remedied by the aforesaid enactments, made in amendment of the revenue law, with respect to the assessment of the rolling stock and other personal property of railroad companies.

We do not conceive, as is objected, that this would involve the result of double taxation of both the railroad company and the car company. The liability of the railroad company to pay taxes on the cars as a portion of its rolling stock, would operate to exempt the car company from liability to pay the taxes as owner of the cars.

The railroad company would be viewed as the owner, *pro hac vice*.

The rule of strict construction of statutes which confer authority to impose taxes, which is appealed to in behalf of the appellee, does not seem to apply. This is not a question of the imposition of the burden of a tax upon the citizen, but, rather, as to which one of two persons is liable for the payment of a tax already imposed. It is not questioned that the cars are chargeable with the tax, and in considering which one of these two companies is liable for its payment, it is not perceived why any strictness of construction should be applied in the case of the one any more than in that of the other.

The judgment of the court below will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

WILLIAM H. COGGESHALL *et al.*62 401
187 615

v.

JAMES M. RUGGLES.

1. **PRINCIPAL AND SURETY.** Where a surety pays the debt of his principal for less than its face, he will be restricted in his recovery from the principal to the sum actually paid.

2. **SAME—change of relation.** A, as principal, and B, as surety, being indebted in the sum of three hundred dollars by their joint note, some time afterward B, becoming apprehensive of the inability of A to pay the same, purchased certain property of the latter, in part payment of which he agreed to assume and pay three hundred dollars on the note, which he failed to do, and judgment was obtained on the note against both: *Held*, that by this arrangement B became the principal debtor, as between himself and it, as to three hundred dollars and interest, in the judgment, and that he could not change such relation afterward without A's consent, by crediting the price of the property upon an indebtedness of A to him and his partner in trade.

3. **JUDGMENT—rights of joint debtor satisfying.** One of two judgment debtors, though surety for the other, can not, after payment in fact by him of the judgment, by arrangement with the creditor holding the same to keep it in apparent life, manage to sell the lands of his co-defendant, and thereby acquire and retain a title to the same. While a court of equity will not treat an execution issued thereon as a nullity, yet if such party, so controlling the judgment after such payment, procures a sale of his co-defendant's lands, on execution under the same, and the transfer of the certificate of purchase to his son, it will treat the certificate as a mere security for the money advanced, and which he is entitled to recover of the principal debtor.

4. **SETTING ASIDE SALE ON EXECUTION—innocent purchaser.** Where land was sold at sheriff's sale, on execution, under such circumstances that the judgment debtor, in equity, has the right to have the sale set aside as against the purchaser, and the purchaser assigns the certificate of purchase to a party having no notice of the equities of the case, but who does not take it absolutely but only on condition of its validity, and who has parted with nothing for it before bill filed to set aside the sale, such assignee can not set up any equities to defeat the bill.

5. **CHANCERY—setting aside sheriff's sale—terms.** In 1855, A, as principal, and B, as surety, executed a note for three hundred dollars. In 1857, the surety becoming doubtful of the solvency of A, purchased of the latter a pair of horses and a buggy for four hundred and twenty-five dollars, and agreed to pay three hundred dollars of the price on the note, which he failed

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to do. In 1861, judgment was recovered on the note against both, which judgment was transferred to one Beasely, who, being indebted to A for corn to the amount of four hundred or four hundred and fifty dollars, agreed with A to apply this debt in payment of the judgment, and the judgment was left unsatisfied for the benefit of A. About six months afterward, Beasely had the lands of B sold on execution, under the judgment, and received a certificate of purchase, which he assigned to a son of A, without any new consideration. B filed a bill to set aside the sale, on the ground that the judgment was satisfied before the sale, and only kept in apparent life for the purpose of selling his property. The court below set aside the sale on that ground: *Held*, on appeal, that A, by the arrangement with Beasely, would, in equity, be regarded as having paid the judgment, except so far as it would be just to allow him to hold the certificate of sale as a security for the money paid by him, which B ought to have paid; that the sale should be set aside upon terms, requiring B to do equity by paying the amount due from him on the judgment.

APPEAL from the Circuit Court of Mason County; Hon. CHARLES TURNER, Judge, presiding.

In April, 1855, Wm. H. Coggeshall, as principal, and James M. Ruggles, as surety, executed a note to Howard & O'Neal, administrators of the estate of one Marshall, deceased. In June, 1857, Ruggles becoming doubtful of the solvency of Coggeshall, purchased of him a pair of horses and a buggy for four hundred and twenty-five dollars, and agreed to pay three hundred dollars of the amount on the note. Failing to do so, the payees brought suit and recovered judgment on the note.

In June, 1865, Coggeshall having sold corn to one Beasely, the then owner of the judgment, to the amount of four hundred dollars or four hundred and fifty dollars, arranged with Beasely to apply this in satisfaction of the judgment, but let it stand without any entry of satisfaction. In January, 1868, execution was issued thereon, and certain lands of Ruggles sold, and certificate of purchase made to Beasely, who shortly afterward transferred the same to a son of Wm. H. Coggeshall without any new consideration.

Messrs. LACEY & WALLACE, for the appellants.

Mr. JOHN B. COHRS, for the appellee.

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Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

In April, 1855, William H. Coggeshall, one of the appellants, as principal, with Ruggles, the appellee, as surety, executed a promissory note for three hundred dollars to the administrators of the estate of one Marshall, deceased. In 1861 suit was brought upon the note in the county court of Mason County, and a judgment rendered in favor of the administrators. The defendants appealed to the circuit court, where the appeal was subsequently dismissed and a *procedendo* awarded. In 1866 an execution was issued on the judgment and levied on the land of Ruggles. There was a sale under the execution and the property was bid off in the name of one Beasely, to whom the judgment had been assigned as guardian of a daughter of Marshall. After the expiration of twelve months he assigned the certificate of purchase to Francis S. Coggeshall, a son of William H. Coggeshall, and he, on the day this suit was commenced, assigned it to Dummer for the benefit of one Martin, who had obtained a judgment against William H. Coggeshall. Dummer, however, merely took the certificate under an agreement that, if it should prove valid, he would satisfy the judgment in favor of Martin, but declined to take it at any price, absolutely, conjecturing, as he says in his answer, that there might be some controversy. Martin is not, therefore, in a position to claim any equities under this assignment. This bill was filed by Ruggles to set aside the sale on the ground that, prior to the sale of the land, an arrangement had been made between Beasely and William H. Coggeshall by which the judgment was in fact paid, though not satisfied in terms, and that it was kept in apparent life in order that Ruggles' property might be sold under it. The court below set aside the sale.

Beasely testifies that he was owing W. H. Coggeshall about four hundred dollars for corn purchased, and they applied this amount to the payment of the judgment. After the sale Beasely assigned the certificate of purchase to the son of W. H. Coggeshall, receiving no new consideration therefor. We are

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satisfied from all the evidence that the father was the real party in this transaction, and that the sale under the execution was for the benefit of Coggeshall with a view to reach the property of Ruggles. Beasley indeed swears that the arrangement in regard to the corn debt was made before the sale.

The decree, then, would have been in all respects correct if the relation of Coggeshall and Ruggles had continued to be that of principal and surety as it was in the beginning. But it appears that several years before the sale, Ruggles, doubting the solvency of Coggeshall, took from him a pair of horses and a buggy, and agreed in consideration thereof to pay the sum of three hundred dollars on the judgment, and so advised one of the administrators. Ruggles thus, as between himself and Coggeshall, became the principal debtor, and his subsequent attempt to cancel this obligation by crediting Coggeshall with three hundred dollars without his consent on an account due from Coggeshall to the firm of Ruggles & Gatton as partners in trade, did not change this relation. The individual debt due from Ruggles to Coggeshall for the horses and buggy could not be thus discharged without the latter's consent.

Nevertheless, although Ruggles had become the principal debtor in the judgment, Coggeshall could not pay the judgment in fact, and still keep it apparently in force for the purpose of selling the land of Ruggles, and acquiring and retaining the title. Admitting, as we are inclined to do, that the arrangement made by him with Beasley was not such a technical satisfaction of the judgment as to render the execution a nullity, still, when Coggeshall received the certificate of purchase by assignment to his son, he acquired no title to Ruggles' land which he could rightfully hold as his own. He could retain it only as security for the money he had paid, and which should have been paid by Ruggles. Until he had offered Ruggles the opportunity of redeeming within a reasonable time, his title amounted merely to a specific lien. Having acquired, by his arrangement with Beasley, the right to control the judgment, he must be regarded in a court of equity as having paid it, except so far as it would be just to allow the

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sheriff's certificate of sale to be treated as a security. The principle is the same as when a surety buys the debt against his principal for less than its face. He can enforce payment to himself of whatever he has actually paid, but only of that amount. Story's Eq. Jur. Sec. 316; *Reed v. Norris*, 2 Mylne & Craig, 361. The conduct of Coggeshall, if his object was to acquire the title to Ruggles' land without his knowledge by means of this judgment, was inconsistent with their obligations to each other as joint debtors, and he can not be permitted to use the certificate for that purpose.

While, therefore, we agree with the court below in the opinion that the complainant can set aside the sheriff's sale and certificate, we think, as already in substance stated, the court should have imposed terms. The complainant must do equity. He should have paid the debt which Coggeshall has paid—at least he should have paid three hundred dollars of it, with the interest from the time that sum should have been paid on the judgment, if Coggeshall himself has paid so large an amount. On his bringing this money into court for the benefit of Coggeshall, the sale and certificate will be set aside.

It is not necessary to discuss the other questions raised in the argument. The true ground for setting aside the sale is the one stated; and the terms of granting this relief, above indicated, are required by the equity of the case.

Decree reversed.

MERRITT FUNK

v.

ABSALOM STUBBLEFIELD *et al.*

1. **EJECTMENT**—*revivor on plaintiff's death.* When the sole plaintiff in an action of ejectment dies, it is not necessary that the suit be revived in the names of all his heirs-at-law, and it is not error to allow the suit to be revived and prosecuted by a part of his heirs.

2. **SAME**—On the death of the sole plaintiff in ejectment, intestate, leav-

Opinion of the Court.

ing several heirs-at-law, the unity of title is severed into aliquot parts, and descends to such heirs, and they each become invested with a separate right of recovery.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WELDON & BENJAMIN and Mr. HAMILTON SPENCER, for the appellant.

Messrs. WILLIAMS & BURR, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of ejectment, brought by William Stubblefield in the McLean circuit court against Merritt Funk, and Hannah Funk, to recover an eighty-acre tract of land. A summons was issued and returned served. At the September term, 1870, the death of plaintiff was suggested, and the suit revived in the name of a portion of his heirs; and on leave of the court they filed an amended declaration, by which they claimed to recover eleven-thirteenths of the premises; to which defendants filed the plea of the general issue. A trial was had by consent of parties without the intervention of a jury, and the issue was found for the plaintiffs as to Merritt Funk, and a judgment rendered that they recover eleven-thirteenths in fee from him; but the court found the issue for Hannah Funk.

The record is brought to this court by appeal, and it is urged that the suit could only be revived in the name of all of the heirs of the plaintiff in the original declaration; that, under the statute, they only had the right to revive by all the heirs joining as plaintiffs.

The ninth section of the ejectment law provides that the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others. In this there is a departure from the rules of pleading; and it manifests an intention on the part of the law ma-

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kers, to give more latitude in this than in other actions; a determination to dispense with mere technical rules, and to afford more enlarged means for a fair trial on the merits. And when we see such an intention manifested by the general assembly, the courts should not thwart that purpose by strict and illiberal construction of the provisions of the law regulating the practice in that action.

The twenty-sixth section of the act provides that the action of ejectment shall not be abated by the death of any plaintiff, or one of several defendants; but the same proceedings may be had as in other actions to substitute the names of those who may succeed to the title of the plaintiff so dying; in which case the issue shall be tried as between the original parties. In other actions, all of the plaintiffs must recover, or none; but we have seen in this action, the declaration may contain a count in which all the plaintiffs claim to recover jointly, and it may also contain counts in which each plaintiff claims the right to recover separately the whole, or any undivided interest in the premises. And in such a case, a part of the plaintiffs may recover, and a part may fail in the action. And where, upon the death of the plaintiff, a part of the heirs revive and file an amended count, and recover, the same result is produced as when a part of the plaintiffs who sue, recover, and a part fail under the ninth section. By such a practice no injury or inconvenience is produced. And it is in harmony with the provisions of the ninth section of the act.

In all other actions the rights of the plaintiffs are joint, and the right remains joint in the survivors or representatives; and, hence, all having an interest in the subject-matter of the suit, must join in reviving it. But in this case, by the death of the plaintiff, the unity of the title is severed, and it descended in aliquot parts to his several heirs, and they each became invested with a separate right of recovery. Cases may not unfrequently occur in which to refuse to permit such a revivor would be a denial of justice. Suppose, in this case, the statute of limitations had been at the point of forming a

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bar, at the time the suit was brought, and when the plaintiff died, the limited period had fully expired, and a part, or any one, of the heirs had refused to join in the revivor, and the suit compelled to abate, in that case the heirs could not have recovered on bringing a new suit. In such a case all can see the necessity of permitting a part to revive the action and to proceed to judgment. And in permitting such a revivor no violence is done to the spirit of the statute, but, on the contrary, it is in accordance with its true intent.

It is said there is no evidence in this record showing the right of tenants in common to recover of co-tenants in common. A sufficient answer to this is, that while this is true, as a general rule, there is nothing in the record from which it appears that either of the defendants was a tenant in common with the plaintiffs. We perceive no error in the record, and the judgment of the court below must be affirmed.

Judgment affirmed.

69	408
35a	306
82	408
85a	405

WILLIAM H. BENNESON

v.

WILLIAM A. BILL *et al.*

1. CHANCERY PRACTICE—*proof on bill confessed.* Where a bill is taken as confessed, the court may, in its discretion, require proof as to any or all the allegations of the bill, or render a decree without proof. And no distinction is made in this respect between bills sworn to, and those not sworn to.

2. RECEIVER—*decree.* On bill against an insolvent insurance company, filed by creditors, the court appointed the master in chancery receiver, and directed him to collect the debts owing to the company, and apply the proceeds in payment of complainants' judgments: *Held*, that the decree was too broad. It should have directed the proceeds to be brought into court, so that the court might distribute it to the creditors entitled.

3. SAME—*who may act as receiver.* Ordinarily, the appointment of a receiver is a matter of discretion; but there are persons, who, owing to their position, are not usually competent to act as such. A party to the suit is

Syllabus. Opinion of the Court.

not, unless by consent of both parties. And a master in chancery, being an officer of court, whose duty it is to pass upon the accounts and check the conduct of a receiver, is disqualified from being appointed receiver.

APPEAL from the Circuit Court of Adams County; the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. SKINNER & MARSH, for the appellant.

Mr. S. N. DAVIS, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from a decree in chancery in the Adams circuit court. The scope and object of the bill filed in the cause, was to compel the defendant, who had been appointed by a decree of that court, rendered at October term, 1869, receiver of the Farmers and Merchants' Insurance Company, under which the assets of that company had been placed in his hands with authority to collect debts and pay liabilities of the company; to institute suits against the officers and stockholders of the company on account of their liability to the creditors of the company, and to apply the proceeds of any money he might make to the payment of the several judgments of complainants against the company, they alleging that they, severally, were insured in that company; that during the life of their policies the property insured was consumed by fire; that they, severally, recovered judgments on the policies against the company; that they caused executions to be issued thereon, all which were returned *nulla bona*. It is further alleged that this company did business under their charter in two departments—a stock and a mutual; that complainants' policies were in the stock department, and full premiums paid in cash; that they relied on the capital and assets of the stock department for payment of losses; that the capital mainly consisted of small per centages paid on stock and of stock notes of stockholders for portions of stock unpaid, secured on property.

A list of stockholders is then exhibited, with amount of stock

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to each, aggregating one hundred and three thousand three hundred dollars, and it is then alleged that upon faith of this, and of representations of the company of their ability to pay losses, complainants and many others insured in the company.

Combination and fraud are alleged, by the officers and members of the company in distributing the assets of the stock department among themselves, showing wherein, and the manner thereof, by which the capital and assets of the stock department were distributed among the members of the company, and the losses left unpaid, etc.

The proceedings to wind up the company instituted by the attorney general are then recited.

This statement sufficiently shows the nature of the proceeding. There is an allegation that complainants had requested defendant to bring suit for the recovery of the assets, etc., or to allow them to use his name for that purpose; the money to be applied to their judgments.

The prayer of the bill is that defendant be compelled to sue for the assets, and to appropriate the proceeds in payment of their judgments.

The court decreed accordingly; and further, that in case defendant failed to bring suit in ninety days, then the master in chancery do the same, and become possessed of the assets of the company, and apply the proceeds to complainants' judgments.

The decree was *pro confesso*, no answer or plea by defendant having been put in.

To reverse this decree the defendant has appealed, assigning the decree as error.

Appellant makes several important points on this record which require much and careful consideration, but to which appellees have not replied. They have confined their attention in their brief, to one single point, and that is, the effect of a decree *pro confesso*.

Appellant insists that upon a *pro confesso* order upon a bill not sworn to, and without any evidence in any form, the court was incapable of passing the decree it did pass.

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A doctrine the opposite of this, is settled by this court in a number of cases. In *Smith v. Trimble et al.*, 27 Ill. 152, it was said, when a bill is taken as confessed, the court trying the cause, may, in its discretion, require proof as to all or any portion of the allegations of the bill, or render a decree on the *pro confesso* order without evidence. The same was held in *Stephens v. Bichnell*, id. 444. In *Harmon v. Campbell*, 30 id. 25, it was said, when a decree *pro confesso* has been entered after default, the defendant can not make any objection that the proof does not sustain the allegations of the bill. The allegations are taken as true by the default. The court had a right to render the decree without any proof.

And such is the statute. Ch. 21, sec. 19, R. S. 95.

No distinction is made between bills sworn to and not sworn to ; but in this case the bill was sworn to.

An objection is made to the scope of the decree, that it is too broad. This, we think, is well taken. The decree should have directed the proceeds of such moneys, as might be collected by the receiver, to be brought into court, that the court might distribute it to the creditors entitled.

There is another objection made to the decree, and that is in appointing the master in chancery of the court the receiver, in the event appellant did not act in ninety days.

As a general rule, the appointment of a receiver is ordinarily a matter of discretion in the court ; but there are persons who, owing to their position, are not usually competent to act as such. A party to a suit is not competent, unless by consent of both parties. Nor is a trustee, for he is the person to see that the receiver performs his duty. The two characters are incompatible ; but in a special case he might be appointed, he engaging to act as such without emolument. And this rule is extended to others besides trustees. In *Taylor v. Oldham*, Jacob R. 527, Lord Eldon held that the son of a next friend, suing for an infant, ought not to be receiver. Nor will a man be appointed receiver whose position may cause difficulty in administering justice. A master in chancery was accordingly held disqualified, he being an officer whose duty it was

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to pass the accounts and check the conduct of a receiver. Kerr on Receivers, ch. 4, pp. 126 to 130.

This court held in *Baker v. Backus*, Adm'r, 32, Ill. 79, that the solicitor of the complainant could not be receiver.

Without discussing the questions made by appellant under his first, second, and third points, we reverse the decree and remand the cause for reasons above given.

Decree reversed.

62	412
46a	177
62	412
56a	540
62	412
a189	*468

JOSEPH H. REYNOLDS

v.

JAMES F. McCORMICK.

1. *REPLEVIN—plea of property in defendant.* In replevin, the plea of property in defendant is mere inducement to the formal traverse of the right of property in the plaintiff. It is not even traversable.

2. *ISSUE presented by plea of property in defendant.* Under such a plea, the issue to be tried is not whether the property is in the defendant, but whether the right of property and the right to immediate possession is in the plaintiff. On such an issue the plaintiff must recover on the strength of his own title, and the burden of proof is on him to establish his right.

3. *REPLEVIN—effect of verdict on title to property.* In replevin, where the defendant pleaded property in himself, and the proof showed that he owned the property jointly with the plaintiff: *Held*, that a verdict for defendant on such issue did not determine judicially that the property was that of defendant exclusively, and that such finding did not affect plaintiff's right to recover the undivided half.

4. *SAME—return of property.* Where the plaintiff sought to recover possession of property in an action of replevin, claiming to be the exclusive owner thereof, and the defendant pleaded property in himself, the proof showing that the property was owned in partnership by the plaintiff and defendant: *Held*, no error for the court to award a return of the property to defendant on a verdict finding such issue in favor of defendant. If the property was, in fact, partnership property, the possession of either was lawful.

Syllabus. Statement of the case.

5. **REFLEVIN**—*by one partner against his co-partner.* It seems that where property is owned by two persons jointly as partners neither can maintain replevin against the other for the exclusive possession.

6. **NEW TRIAL**—*finding of jury.* Where the only witnesses examined upon the point in issue are the two parties to the suit, and their testimony is flatly contradictory, the court will not undertake to say which witness the jury ought to have credited.

7. **EVIDENCE**—*error not prejudicial.* Where a plaintiff has already proved a certain fact which is not disputed by the defendant, it is no error to reject other proof to the same effect.

APPEAL from the Circuit Court of Adams County; the Hon. JOSEPH SIBLEY, Judge, presiding.

The facts are sufficiently stated in the opinion of the court, except that the defendant below claimed to have purchased one-half interest in the property replevied of the plaintiff, while they were practicing medicine in partnership. On this point, the only testimony was that of the parties, who expressly contradict each other. The court below refused the third and fifth instructions asked by plaintiff, which are as follows:

3. If the jury believe, from the evidence, that the defendant's only claim of right to the property is by purchase from the plaintiff, they should find the property in question the property of the plaintiff, unless, upon consideration of all the evidence upon the question of such purchase, they believe the same preponderates in favor of such purchase, in fact, having been made.

5. If the jury believe, from the evidence, that the property in question was the property of the plaintiff, and even if they further believe, from the evidence, that the defendant purchased of the plaintiff an undivided half interest therein, and that such purchase is defendant's only claim or right to the same, in such case these facts will not, in law, prove the defendant's plea of property in the defendant.

The court gave the following instructions for defendant, to which plaintiff excepted:

Statement of the case.

1. If the jury believe, from the evidence, that, at the time the property replevied in this case was replevied, it was owned by both the plaintiff and defendant as partnership property, the jury will find the issues for the defendant.

2. The court further instructs the jury, on behalf of the defendant, that in determining upon their verdict in this case, they should take into consideration all the facts and circumstances in evidence before them, and if, after full consideration of all such facts and circumstances, the jury are of the opinion from the same that the defendant did purchase one-half interest in the property replevied in this suit as testified to by him, then the jury should find the issues for the defendant.

3. The court instructs the jury, on behalf of the defendant, that in order to entitle the plaintiff to a verdict, it is incumbent on the plaintiff to establish, by evidence in the case, that the goods and property replevied in this suit were in the possession of the defendant, or that he detained the same from the plaintiff at the time the suit was commenced; and unless the jury do believe from the testimony given in this case, that said property was in the possession of the defendant, or that he detained the same when this suit was commenced, then they should find for the defendant upon the issue of detention of such property only.

The jury found the issues for the defendant. Plaintiff moved the court for a new trial, which was denied, and judgment rendered on the verdict, and for a return of the property.

Messrs. SKINNER & MARSH, for the appellant.

Messrs. WARREN, WHEAT & HAMILTON, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The declaration in this case contained two counts: one for the taking, and one for detaining, the property described in the writ.

Opinion of the Court.

The pleas were, first, *non detinet*; second, *non cepit*; and third, property in the defendant, with issue thereon to the country.

The third plea filed by the appellee is, in effect, a special or formal traverse, averring, by way of inducement, property in himself, and traversing, under the *absque hoc*, the appellant's allegation of ownership in the property. It has been uniformly held by this court, in harmony with the decisions in other States where the common law practice prevails, that the allegation of property in the defendant is merely inducement to the formal traverse of the right of property in the plaintiff. It is not even traversable.

The question raised by such a plea is not whether the property is in the defendant, but whether the right of property and the right to immediate possession is in the plaintiff. It was held by this court, in *Constantine v. Foster*, 57 Ill. 36, that under the plea of property in the defendant or a stranger, in an action of replevin, with a denial of the right of property in the plaintiff, the only issuable fact is the right of property in the plaintiff; and, under such a plea, the plaintiff must recover on the strength of his own title, and that the burden of proof is on him to establish his right. *Anderson v. Talcott*, 1 Gilm. 371; *Chandler v. Lincoln*, 52 Ill. 74.

The question made by the pleadings in this case, and submitted to the jury for their consideration, was not whether the property was the property of the appellee, but whether it was the property of the appellant, and whether he was entitled to the exclusive possession.

On this question, the only witnesses examined were the parties themselves, and their testimony is flatly contradictory. In such cases we can not undertake to say which witness the jury ought to credit. The verdict will be deemed conclusive of the controverted facts.

The only fact settled by the verdict is, that the appellant is not the sole owner of the property in controversy, and entitled to the exclusive possession. It does not determine judicially,

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as the counsel seem to suppose, that the property is the exclusive property of the appellee. We do not understand that the appellant's right to recover the undivided one-half of the property is in any manner affected by the verdict in this case. That question was not in issue by the pleadings.

If the property was, in fact, partnership property, the possession in either party was lawful, and the order for the return of the property, on the finding of the jury, was not improper. It simply placed the parties *in statu quo*, where their respective rights to the property could be settled at a future period in some appropriate action.

It is insisted that the court erred in excluding the testimony of Doctor Baker as to the value of the property. If it be conceded that the evidence offered was admissible, we can clearly see that the appellant was in no wise prejudiced by the rulings of the court. The value of the property proposed to be proven by the witness, Baker, was testified to by the appellant, and the witness Niles, and its value fixed. The appellee did not dispute the value placed on the property by the witnesses; nor offer any rebutting evidence. Hence, the facts proposed to be proven by Baker, were, in effect, conceded by the appellee.

The instructions given on behalf of the appellee are not inconsistent with the views expressed in this opinion. They substantially state the law as applicable to the case, and could not mislead the jury on the issues involved.

The instructions asked on behalf of appellant, and refused by the court, do not state the law correctly as we understand it, and were properly refused.

No material error appearing in the record, the judgment is affirmed.

Judgment affirmed.

Syllabus.

ELIZABETH RICHARDS

v.

JOHN N. MILLER.

1. *WILL—devise—words to pass real estate.* The words, "I give, devise, and bequeath to my heirs-at-law the remainder of my estate," are sufficient to embrace and pass real estate left by the testator.

2. *SAME—meaning of word "heirs."* The rule rigidly adhered to by the courts is, that the words employed by a testator in his will, will be presumed to have been used in their strict and primary sense, unless the context shows them to have been used in a different sense. When not thus explained, their legal and technical meaning will be enforced. Thus, the word *heirs*, unexplained by the context, will be held to mean the persons appointed by law to succeed to the estate in case of intestacy.

3. *PAROL EVIDENCE—to explain who meant by "heirs-at-law."* Where a residuary devise in a will was in these words: "I give, devise, and bequeath to my heirs-at-law the remainder of my estate:" *Held*, that parol evidence of the instructions given by the testatrix to the scrivener who drafted the will, for the purpose of explaining who she meant by the words heirs-at-law, was not admissible.

4. *SAME—to identify heirs, etc.* But proof of the amount and nature of the fund to be distributed, to show whether personalty or realty, and the names of the persons who sustained such relations to the testatrix as would constitute them heirs-at-law, is not only proper, but necessary to an order of distribution. But such proof does not raise a latent ambiguity to justify proof of the declarations of the testatrix, made at the writing of the will, to show who she considered her heirs.

5. *DEVISE—to heirs-at-law—construction.* When gifts by will to heirs-at-law are made to them *simpliciter*, the persons to take and the proportions must be determined by the statute of descents and distribution. So, where a testatrix, after directing the payment of her funeral expenses and debts, and certain pecuniary legacies, provided in her will as follows: "I give, devise, and bequeath to my heirs-at-law the remainder of my estate," and she died, leaving a husband, and brothers, sisters, and descendants of brothers and sisters, but no children, father, or mother: *Held*, that her husband, being an heir-at-law, was entitled to one-half of the real estate left by the testatrix, under such clause, or the surplus of the proceeds of its sale to pay debts and legacies which was held to be realty under the will; and this, notwithstanding a prior specific bequest to him.

6. *SAME.* This case is distinguished from *Pitney v. Brown*, 44 Ill. 363. In that case the fund was directed to be "equally divided" between A and 27—62D ILL.

62	417
27a	30
62	417
196	569
196	563
62	417
29a	647

62	417
a92a	*197
62	417
191	*801
62	417
208	*86

Syllabus.

the heirs of B, and the court there held that A and each of the heirs of B took *per capita*, and not *per stirpes*. In that case the gift was not to a class, as in this, to be ascertained by reference to the statute, but to certain individuals, as if personally named. When the words "equally," "share and share alike," or "to be equally divided" are used in a will, they mean a division *per capita*.

7. *WILL—interpretation—what law governs.* Where a will designates a particular class or description of persons as taking under it, the proper persons who are entitled to take must be ascertained by the law of the place where the will is made, and the testator is domiciled. Thus, if a testator should bequeath personal estate to his "heirs-at-law," the law of his domicile will determine the persons entitled to take under such description.

8. *SAME—as to realty.* The law of the place where real estate devised is situate, governs in the construction and interpretation of the will. Thus, if a residuary devise, under which is included land or money arising from its sale treated as realty, is made to the "heirs-at-law" of the testatrix without designation by name, or words showing a different intention, such realty will pass to the heirs-at-law of the testatrix, as in case of intestacy, according to the statute of the State in which the real estate is situated.

9. *DEVISE—realty—money when so treated.* Even a direction in a will to sell land for a particular purpose does not indicate an intention to convert real into personal estate *to all intents*, so that the surplus of the proceeds will pass under a residuary bequest of personalty. Every conversion, however absolute, will be deemed a conversion for the purpose of the will only, unless the testator distinctly indicates a different intention.

10. *SAME—Where a will, by its terms, gave no direction for the sale of real estate, and created no charge upon the land for the payment of legacies, but, after directing the payment of debts and personal expenses, contained this clause: "I give, devise, etc., the remainder of my estate:" Held, that if the right to sell real estate embraced in the residuary devise to pay legacies were conceded, the legacies would be a charge by implication only, resulting from a deficiency of personal assets; and the right to sell would be limited to the necessity, and the surplus of the proceeds, after satisfying the debts and legacies, would retain the character of real estate.*

11. *SAME.* In such case, if the county court should direct the sale of the whole of the real estate for the payment of debts and legacies, it will be presumed that the whole was ordered to be sold because not susceptible of division without injury to the estate, and such sale will not convert the surplus proceeds into personal estate, but it will be treated in the final distribution as realty.

12. *"HEIR" defined—in devise.* An heir is one who inherits or takes from another by descent, as distinguished from a devisee, who takes by will. He is one upon whom the law casts the estate immediately upon the death of

Syllabus. Statement of the case.

the owner. When property is devised to the testator's heirs-at-law, without other designation, it passes as in case of intestacy.

APPEAL from the Circuit Court of Adams County ; the Hon. JOSEPH SIBLEY, Judge, presiding.

Francis Miller made her last will and testament, first directing the payment of her funeral expenses and just debts, after which she made various specific and pecuniary bequests to various persons, and to religious associations. Among these was the following :

"2. After the payment of my funeral expenses and all my debts, I give, devise, and bequeath unto my beloved husband, John N. Miller, \$2,000 in money, one good bed and bedding, one cow, his choice of the horses, and the buggy and harness."

Joseph Turner, who drafted the will, was named as executor. About a year after making the will the testatrix died. The executor, after qualifying, found the personal assets insufficient to pay the debts and pecuniary bequests, and applied to the county court of Adams County for an order to sell the real estate of which the testatrix died seized, being her homestead of about 100 acres. The court ordered the sale of the whole of it, as prayed for. On report and settlement with the county court, there was \$4,177.17 in the hands of the executor for distribution according to the terms of the will. The executor asked for an order directing the distribution of this surplus to the brothers and sisters, and the descendants of the deceased brothers and sisters of the testatrix. The court ordered him to pay one-half of the sum to John N. Miller, the husband of the testatrix, and the other half as asked by the executor. From this order Elizabeth Richards, a sister of the testatrix, appealed to the circuit court.

On the trial in the circuit court, the order of the county court was affirmed, and an appeal taken to this court.

Messrs. BROWNING & BUSHNELL, for the appellant.

Opinion of the Court.

Messrs. WHEAT & MARCY, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

The testatrix directed the payment of her funeral expenses and debts ; and after their discharge she made bequests to her husband and other persons, and several religious societies. She then added this residuary clause :

“ I give, devise, and bequeath to my heirs-at-law, the remainder of my estate.”

Upon her death she left surviving her a husband, and brothers and sisters, and their descendants, but no children, and no father or mother.

The personal property was insufficient to pay the debts and specific legacies, and an order was obtained from the proper court to sell the real estate. The whole of the estate was sold, and upon a settlement over four thousand dollars remained in the hands of the executor for distribution.

Who are meant by the words “ heirs-at-law,” the husband as well as the brothers and sisters, or only the latter ?

We must first ascertain the character of the residuum. Was the real estate, by the sale, converted into personal property ?

The will gave no compulsory direction—indeed, none whatever—for the sale of the land ; and as the application was made to the court for license, the presumption must be indulged, that the whole was ordered to be sold because it was not susceptible of division, and to avoid injury to the parties interested. The mere order to sell the whole, because it was not susceptible of division without prejudice to the heirs, certainly could not convert the land into money out and out. If so, then the court had the power to change the nature of the bequest and defeat the intention of the testatrix.

The land was devised by the residuary clause. The words “ the remainder of my estate ” embrace it. After the application of the personal assets, in discharge of the debts and legacies, they being primarily liable for their payment, the heirs-

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at-law might have taken the land, by satisfaction of the remaining unpaid debts and legacies. It would be strange, then, if a plain devise of land could be changed into a bequest of personalty by the order of the court, and thus a change of devisees effected.

The will gave no directions to sell or convert the real estate. The intention of conversion, then, can not be gathered from it. In express terms it created no charge upon the land for the payment of legacies. The language is: "After the payment of my funeral expenses and debts, I give, devise, etc." But conceding the right to apply the proceeds of the sale of the land in discharge of the specific legacies, they would only be an implied charge, resulting from a deficiency of personal assets, and not from the language of the will. The right to sell and apply the proceeds was, therefore, limited to the necessity which existed for the payment of the unpaid debts and legacies; and the land can not be regarded as converted out and out. The surplus will retain the character of realty so far as the charge does not extend.

Upon an examination of the authorities, it will be found that even a direction in a will to sell land for a particular purpose does not indicate an intention to convert real into personal property, to all intents, so that any surplus of the proceeds should pass under a residuary bequest of personalty. Much less reasonable is the conclusion of an intention to convert the land, in this case, when there is a devise of it and no direction to sell—no language indicating the intention that it should be converted into money, not even the declared intention that it should be so changed for the purposes of paying legacies. The charge upon it, if any existed, arose only by implication.

We cite a few of the authorities which sustain the view presented.

In *Maugham v. Mason*, 1 Ves. & B. 409, Sir William Grant said: "Properly speaking, nothing is the personal estate of the testator which was not so at his death. When there is nothing but a direction to sell land, with application

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of the money to a particular purpose, and a subsequent bequest of the residue of the personal estate, I know of no case, in which it has been held, that the surplus, after the particular purpose is answered, forms part of the personal estate."

Mr. Cox, in his note to *Cruse v. Barley*, 3 Peere Williams, 22, says that the several cases upon this subject seem to depend upon whether the testator meant to give to the proceeds of the real estate the quality of personalty, *to all intents*, or only so far as respected the *purposes of the will*; and that unless he sufficiently declared his intention that the produce of the real estate should be taken as personalty, the surplus will result to the heir.

Mr. Jarman, in his work on Wills (vol. 1, p. 558), declares, that every conversion, however absolute, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates a different intention.

Under the circumstances of the case at bar, the conversion of the land into money must be regarded as only for the purposes of the will; and when they are satisfied, the money remained as land. 1 Jarman on Wills, 523 b. *et seq.*; *Smith v. McCrary*, 3 Iredell Eq. 204; *Acroyd v. Smithson*, 1 Bro. C. C. 503; *Roper v. Radcliffe*, 9 Mod. 167; *Cruse v. Barley*, 3 Peere Williams, 20; *Stonehouse v. Evelyn*, *id.* 252; *Chitty v. Parker*, 2 Ves. Jr. 271; *Berry v. Usher*, 11 Ves. Jr. 87; *Bourne v. Bourne*, 2 Hare, 35; *Wood v. Cone*, 7 Paige, 472; *Wright v. Trustees Meth. Epis. Church*, Hoffman, 205.

Is the husband an heir? The statute unquestionably makes him such, when it says, that, upon certain contingencies, one-half of the real estate of the wife shall descend to him as his exclusive estate forever. An heir is one who inherits. He takes an estate in land from another by descent, as distinguished from a devisee, who takes by will. He is one upon whom the law casts the estate immediately upon the death.

It is strenuously objected, that the husband can not be regarded as an heir because the wife died testate; and that the statute makes him an heir only in case of intestacy. The same objection would apply to the brothers and sisters who

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are contesting the distribution of the surplus; for they could only be heirs-at-law, upon the death without children and without a will. This objection, too, amounts to the assumption, that the will has disposed of the land in a different manner from what the law would do.

The will devised the land, but made no designation of devisees by name. If the statutory rule should govern, then the money, regarded as land, must be distributed according to the statute; and the result would be as in the case of intestacy. The land was situated here; the testatrix had her domicile here; and the meaning of the will must be determined by reference to the law of descents as it exists in this State. Where the will gave the residue of the estate to the heirs-at-law, uncontrolled by any other words, the property must descend according to the law of the place where it is situated, and where the will is to be carried into effect.

The law of the domicile must govern as to the persons to take. 1 Jarman on Wills 1 and 2; 2 Green. Ev. Sec. 671; Story Con. Laws Sec. 479 e.

Judge Story says, when the will designates a particular class or description of persons, the proper persons who are entitled to take must be ascertained by the law of the place where the will is made and the testator is domiciled. Thus, if a testator should bequeath his personal estate to his "heir-at-law," the law of his domicile will determine the person entitled to take under such description.

If the testatrix had died intestate and without children, the statute would have distributed the real estate as follows: to the husband one-half, as his exclusive estate forever, and the balance to her parents, brothers, and sisters, and their descendants, giving to each of the parents a child's part, or to the survivor of them, if one be dead, a double portion; and if there be no parent, then to the brothers, and sisters, and their descendants. The same statute, by the aid of which we determine that the brothers and sisters are heirs-at-law, also makes the husband heir-at-law.

Can we, according to the rules of interpretation, and with

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nothing in the context to aid, construe the words "heirs-at-law" in the popular sense? Can we say that next of kin were intended? To do so would be a bold advance toward overturning established rules.

The rule has been rigidly adhered to by all courts that a testator must be presumed to use the words in which he expresses himself, in their strict and primary sense, unless, from the context of the will, it appears that he has used them in a different sense. The legal and technical meaning must be enforced when unexplained.

The word heir, when uncontrolled by the context, designates the person appointed by law to succeed to the real estate in question in case of intestacy. 2 Jarman on Wills, 1.

In *Rawson v. Rawson*, 52 Ill. 62, the above rule of interpretation was approved, and it was held, in construing the meaning of the words "heirs-at-law" that they designated the persons appointed by law to succeed to an estate, as in case of intestacy. The case of *Baskin's Appeal*, 3 Penn., 304, was cited with approval. In this case, it was decided that where a testator made a bequest to all his heirs equally, he intended such as could only be ascertained by a resort to the statute of distributions.

It was also held in *Rawson v. Rawson*, *supra*, that heirs-at-law, as used in a will, are such as are made so by statute, and are the persons upon whom the law casts the estate in case of intestacy; and that a widow was an heir-at-law under the statute, inheriting from her husband. The language of the statute, which gives one-half of the real estate of the husband to the wife is identical with that which gives one-half of the real estate of a *feme covert* to her husband.

We must, therefore, hold that the intention of the will was to include the husband as one of the heirs-at-law.

Is this intention controlled by the context? The prior bequest to him should not have that effect. It has often occurred, that a testator has made special bequests to some of his heirs, and then bequeathed equally the residue of his estate to all of them. Good reasons may often exist for such

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disposition of an estate. Some of the heirs may have had larger advancements; the necessity may be greater to make more ample provision for one than another; or the love and affection which prompt the gift may be stronger in one case than another. The tie which linked together the husband and wife in this case was more sacred than the tie which bound her to her relatives. The better and kindlier feelings of the woman, and love enthroned in the heart of the wife, would prompt the gift to the husband, while only cold duty might induce the bestowal of any thing upon her next of kin. It would be most unreasonable to infer, from this fact alone, the exclusion of the husband from any benefit from the residuary clause. See *Ferguson and wife v. Stuart, Ex'r.*, 14 Ohio, 140.

It is also contended, that, even if the husband is one of the residuary legatees, he is not entitled to one-half of the residuum, and *Pitney v. Brown*, 44 Ill. 363, is cited as authority.

In that case the testator directed the fund "to be equally divided" between Brown and the children of Pitney. The court held that, while distribution *per stirpes* would be the most reasonable construction, the established rule must be adhered to, which, as laid down by Jarman, is, that if a bequest be made to my brother A and the children of my brother B, A takes only a share equal to that of one of the children of B. Vol. 2, 111. If B had three children, this would be a gift to be equally divided between the four persons. It is not a gift to a class, to be ascertained by reference to the statute, but a gift to certain persons, as if they were individually named. It is only necessary to find out the number of the children of B, and then the persons take *per capita*, and not *per stirpes*.

The words, too, "equally," or "share and share alike," or "to be equally divided," import an intention. When they are used in a will they mean a division *per capita*.

In the case before us there are no words indicating equality of division. The gift is to a particular class. We must invoke the aid of the statute to determine the persons who constitute the class. When invoked to ascertain the persons to

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take, we must follow its provisions as to the quantity they shall take.

No complaint is made of the order of distribution, except that one-half of the residuum is given to the husband. Exclusive of him the heirs of the testatrix are sixteen in number, including a number of grand-nephews and nieces. An equal division was not, and ought not, to be made among them. Leaving out the husband, the other heirs do not take *per capita*. The descendants of the brothers and sisters who may be dead only inherit the shares which their parents would have received if living. Again, suppose one of the parents—the father—had survived, would he take only the one-seventeenth part, or a double portion, as provided by the statute? The question answers itself.

It seems to us, that when gifts by will to heirs-at-law are made to them *simpliciter*, the persons to take, and the proportions, must be determined by the statute of distributions.

In the view we have taken of this will, there was no error in refusing evidence of the instructions given to the scrivener. It is assumed that the will disposes of personalty only; and, as the proof shows the fund to be distributed arose from the proceeds of the sale of the land, that by such parol evidence a latent ambiguity was raised, which might be removed by parol evidence of the declarations of the testatrix.

On the contrary, we think that the will disposed of the entire estate in as plain words as could be used, and the proof as to the character of the estate devised created no ambiguity, but rendered the intention more certain. The dispute was as to the meaning of the words "heirs-at-law." Before the order of distribution could be made, there must necessarily be proof of the amount and nature of the fund or property to be distributed, and of the names of the persons who sustained such relations to the testatrix as would constitute them heirs-at-law. This could not justify proof of the declarations of the testatrix at the time the will was written.

Under such a rule, the requirement that a will shall be in writing; of the solemn attestation; and the certain and endur-

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ing character intended to be given to it would be wholly dispensed with and destroyed.

The judgment is affirmed.

Judgment affirmed.

JOHN LEE

v.

JAMES M. RUGGLES.

1. **TAXATION—*who may levy.*** Where commissioners were appointed, by act of the legislature, to levy special taxes upon certain lands for the purpose of drainage, and the act provided that the same should be submitted to a vote of the legal voters of the district to be drained, owning or occupying lands within the same, and that, unless adopted, it should be of no force, if the act is adopted by vote, as required, such commissioners may be regarded as corporate authorities under the constitution of 1848, and might be vested with power to assess and collect taxes for corporate purposes.

2. **SAME—*equality and uniformity.*** Where special taxes are levied, not upon the valuation of the lands assessed, nor confined to the special benefits conferred by the proposed improvement for which they were authorized, it will be a violation of the principles of equality and uniformity required by the constitution, and the taxes will be illegal.

3. **SAME.** So, where, by a special act of the legislature, passed in 1859, a special tax was authorized to be levied upon certain lands for draining the same, and three commissioners were appointed to carry out the object of the act; and two other persons named in the act, with such other disinterested person as they might associate with them, were appointed to classify the lands into three classes, so that the tracts to be most benefited by the drainage should be placed in the first class, and those least benefited in the third class, and return such classification to the commissioners; and it was made the duty of the latter to levy upon the lands described a tax sufficient to complete the drainage of the same, the first class paying the highest rate on the county assessor's assessment, not exceeding fifty cents per acre, the second class to be such a percentage on said assessment, not, however, to exceed forty cents per acre, and the third class in the same way, the rate, however, not to exceed thirty cents per acre: *Held*, that taxes levied under such act were illegal, for the reason that a sufficient sum was required to be

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levied upon the lands to complete their drainage, not exceeding fifty, forty, and thirty cents per acre in the respective classes, without any regard to whether the lands were benefited to the extent of the tax or not.

4. SAME. A tax assessed upon the basis of dividing the lands into three classes according to the difference in benefits, fixing a maximum rate of taxation in each class, and making an arbitrary difference of ten cents per acre in the different classes respectively, is not a tax assessed upon each tract only to the extent of the special benefits conferred upon it.

5. CHANCERY JURISDICTION—*cloud on title*. A court of equity will entertain jurisdiction of a bill by the owner of land who is in possession, to remove a cloud upon his title consisting of an illegal tax deed obtained upon it.

6. BILL TO REMOVE CLOUD—*tender*. On bill to set aside a tax deed on complainant's land, on the ground that the taxes for which the land was sold were illegally assessed for drainage purposes, and the deed was a cloud upon the title, it was objected that the bill should have offered to refund to the defendant the taxes discharged by him in his purchase: *Held*, that, as it appeared the taxes were illegal, and no charge upon the land, and it did not appear by the bill that any benefit had been bestowed upon the land by drainage, or otherwise, the defendant had no equitable claim to have the taxes paid by him refunded.

APPEAL from the Circuit Court of Mason County ; the Hon. CHARLES TURNER, Judge, presiding.

The Circuit Court sustained a demurrer to complainant's bill and dismissed the same.

Messrs. DEARBORN & CAMPBELL, for the appellant.

Messrs. LACEY & WALLACE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was a bill in equity filed by the appellant, John Lee, to remove a cloud upon his title to a certain tract of land in Mason County, by reason of a tax deed, claimed to have been illegally made by the sheriff of said county for the land, in default of payment of two drainage taxes assessed upon it.

By an act of the legislature, approved February 24, 1859, it

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was provided that, in addition to the State and county tax there should be levied and collected, in the year 1859, a sufficient special tax for draining the same, on certain lands within the county of Mason, which were particularly described by their numbers, among which was embraced the tract in question. Three persons named in the act were appointed commissioners for carrying out the purpose of the act.

Two other persons named in the act, with such other disinterested person as they might associate with them, were appointed to classify the lands so described, placing the portion most to be benefited by drainage in the first class, and the least to be benefited in the third class, and return the classification to the commissioners; and it was made the duty of the latter to levy upon the lands described a sufficient tax to complete the drainage of the same, the tax to be levied according to the classification, the first class paying the highest rate of taxation, and to be a percentage on the assessment of the county assessor for the year 1859, and in no case exceeding fifty cents per acre. The second class to be such a percentage on said assessment as should in no case exceed forty cents per acre, and the third class to be at such rate as should not in any case exceed thirty cents per acre.

By another act passed February 16, 1865, entitled "An act to revive an act relating to certain lands in Mason County," an additional tax was authorized to be so assessed for the year 1865, which, with the delinquent tax of 1859, was to be entered upon the collector's book for 1865, and collected as other State and county taxes.

It was for the satisfaction of these two taxes, levied upon the land under the authority of the above acts, that the sale was had and the tax deed made.

A demurrer to the bill was sustained, and the complainant appealed.

It is insisted, on the part of appellant, that the present case is governed by those of *Harward v. The St. Clair Drainage Co.*, 51 Ill. 130, and *Hessler v. Drainage Commissioners*, 53 Ill. 106, where it was held, that a levy of a tax by commis-

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sioners similarly appointed, and for a like purpose, was invalid under the provision in the 5th section of the 9th article of our constitution, that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;" that such provision was a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities, and by whom was to be understood those municipal officers who are either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent, and that commissioners named and appointed as in this act, were not such corporate authorities. In those cases, the acts were never submitted to a vote of the inhabitants of the district embraced in the acts. In *The People ex rel. v. Salomon*, 51 Ill. 51, it was held, where an act, vesting the power of taxation in park commissioners to be appointed by the governor, had been submitted to a vote of the people of the district to be affected by their acts, and adopted, the commissioners thus appointed were a corporate authority within the meaning of the constitution.

Under the latter decision it would seem to follow, that, had the act in question, of 1859, been submitted to and adopted by a vote of the people within the district to be drained, these commissioners might be regarded as such a corporate authority. The 9th section of this act of 1859 does provide for its submission to a vote of the legal voters within the district to be drained, owning or occupying land within the same, and that, unless adopted, it shall be of no force or effect. Appellant's counsel denies, in argument, that the act was submitted to a vote; the bill is silent upon the subject. Without saying what the presumption should be on demurrer, we will dismiss the point without further consideration, as we must hold the taxes to be invalid upon another ground, and that is, that they were imposed in entire disregard of the principle of equal-

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ity and uniformity. It was declared, in *The City of Chicago v. Larned*, 34 Ill. 279, that under our constitution there did not exist a power of apportioning taxes, whether of a general or of a local character, except on the principle of equality and uniformity. The language of the constitution in that respect is, that the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, and that taxes for corporate purposes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same; and it was held, that special assessments were reconcilable with this principle, and could be upheld only where the special benefits a lot would derive from the improvement, were assessed to it, and the residue of the cost paid by equal and uniform taxation. And in *Harward et al. v. St. Clair Drainage Co. supra*, it was said, a tax assessed upon each tract only to the extent of the benefits conferred would be no violation of the principles of equality and uniformity.

The assessments in question were not based upon the valuation of the respective tracts of land assessed for the drainage of the lands embraced in the act, neither was the assessment made upon each tract only to the extent of the special benefits conferred. A sufficient tax was authorized to be levied upon the lands described to complete their drainage, provided it did not exceed fifty, forty, and thirty cents per acre on the lands in the respective classes, without any regard to whether the lands were benefited to the extent of the tax or not. It would not follow that the lands would be benefited to the extent of the amount of money expended in the drainage of them, much less that any particular tract would be benefited to the extent of the tax imposed upon it. The only regard had to benefits was, that the lands were to be classified into three classes, placing the portion most to be benefited in the first class, and that to be least benefited in the third class; the tax to be levied according to classification, the first class paying the highest rate of taxation, and then fixing a maximum rate of taxation in each class, making an arbitrary differ-

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ence in it of ten cents per acre in the different classes respectively.

Manifestly, a tax assessed upon such a basis would not be one assessed upon each tract of land only to the extent of the special benefits conferred on it.

The complainant being in the possession of the land, a court of equity would entertain jurisdiction of a bill to remove a cloud upon the title, consisting in an illegal tax deed obtained upon it, as repeatedly held in recent decisions of this court. *Gage v. Rohrbach*, 56 Ill. 262; *Gage v. Billings*, id. 268; *Reed v. Tyler*, id. 288.

As to the bill not offering to refund to the defendant the taxes discharged by him,—as they were illegally assessed, they were no charge upon the land, and the complainant was not liable for their payment; and it not appearing, by the bill, that any benefit had been bestowed upon the land in the way of drainage or otherwise, there would arise no equitable claim upon the complainant that he should refund the taxes discharged by the defendant by his tax sale purchase.

The demurrer to the bill should have been overruled.

The decree must be reversed and the cause remanded.

Decree reversed.

ALEXANDER STOBIE *et al.*

v.

HARRISON DILLS.

1. CONTRACT—*construction as to party bound.* The lessees in the caption of a lease were described as “trustees of Quincy Lodge No. 139, I. O. of G. Templars,” and they executed the same in their individual names, and in the body of the instrument covenanted to pay the rent, without using any words to show an intention to bind the lodge: *Held*, that they were personally liable; and that the words “trustees,” etc., were merely *descriptio personæ*, and did not change the legal effect of their undertaking.

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36a 114
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2. **PAROL EVIDENCE**—*to explain contract.* Where parties covenant personally to pay rent, and execute the obligation in their individual names, evidence *dehors* the written undertaking is inadmissible to show that they intended to bind an incorporated lodge, although in the body of the obligation they are described as trustees of such lodge.

3. **LANDLORD AND TENANT**—*relation how terminated.* Where, before the expiration of the term, the landlord, with the consent of the lessee, makes a new lease to another person, who enters into possession and pays rent to the landlord, this will terminate the first lease, and from that time will bar a recovery of rent from the first lessee.

4. **SAME**—*pled.* In a suit upon a written lease for the recovery of rent, the defendants, who were the lessees, pleaded in bar as to the rent from a certain day, that on such day the plaintiff, with the assent of defendant, leased the premises to another person named, at a specified rent, and accepted such person as his tenant in the place of the defendant; that such person took possession of the premises, and has since paid the plaintiff all the rent due under his lease, and the acceptance of rent from such new lessee by the lessor, whereby the said indenture (sued upon) was canceled and annulled: *Held*, that the plea showed a complete defense to the recovery of rent accruing after such new arrangement.

5. **SAME**—*surrender—abandonment.* The lessee can not surrender premises leased to him, before the expiration of the term, so as to absolve himself from the payment of rent thereafter, without the consent of the lessor; and the abandonment of the premises, with notice thereof to the lessor, will not exonerate the lessee thereafter from his obligation to pay rent, unless the lessor assents thereto.

6. **INSTRUCTION**—*as to evidence.* According to the practice in this State the court is not justified in instructing the jury that any fact has or has not been proved, where any evidence has been admitted bearing upon the point, except where a question of law is involved, as in the proof of title.

7. **ERROR**—*not cause for reversal.* Where the court instructed the jury that there was no evidence of a material fact involved, and there was evidence admitted on the point, which this court deemed wholly insufficient to establish the fact: *Held*, that, as the error worked no prejudice, it was no ground for reversal.

APPEAL from the Circuit Court of Adams County; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an action of covenant upon the following lease:

"This indenture, made this first day of January, A. D. 1867,
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between Harrison Dills, of Quincy, Illinois, of the first part, and Alex. Stobie, L. H. Wilcox, and John W. Obert, Trustees of Quincy Lodge No. 139, I. O. of G. Templars, or their successors in office, of Quincy, Illinois, of the second part, witnesseth : that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, their executors, administrators, and assigns, has demised and leased to the said party of the second part all those premises, etc. To have and to hold the above described premises, with the appurtenances, unto the party of the second part, their executors, administrators, and assigns from the first day of January, A. D. 1867, for, and during, and until, the first day of January, 1872. And the said party of the second part, in consideration of the leasing of the premises aforesaid by the party of the first part to the party of the second part, does covenant and agree with the said party of the first part, his heirs, etc., to pay to said party of the first part, as rent for said demised premises, the sum of three hundred dollars per annum, payable at the end of each month, at the rate of twenty-five dollars per month."

The parties of the second part, in all the covenants following use the words "they," and "their heirs." The lease was signed, H. Dills (L. S.), Alex. Stobie (L. S.), L. H. Wilcox (L. S.), John W. Obert (L. S.).

The breach assigned was the non-payment of twelve hundred dollars rent, up to Dec. 31, 1870.

The defendants pleaded eleven pleas :

1. *Non est factum*, verified by affidavit.

"2. And for an amended plea by them secondly above pleaded in this behalf, the defendants say, *actio non*, because they say that no part of the said rent in the said declaration mentioned is in arrear, or unpaid, in the manner and form as the said plaintiff hath above, in his declaration in that behalf, alleged, and of this the said defendants put themselves upon the country," etc.

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"3. And for a further amended plea by them thirdly above pleaded in this behalf, the defendants say, *actio non*, because they say that they executed the indenture as trustees of Quincy Lodge No. 139, Independent Order of Good Templars, a corporation duly incorporated under and by virtue of the statute of this State, for and in behalf of the said corporation, for the sole and only purpose of binding the said corporation, and not otherwise, or in any other capacity whatever, and not for the purpose of binding themselves individually; that the said defendants, at the time of executing the said indenture, had full power and authority to make, execute, and seal the said indenture in behalf of the said corporation, and to bind the same thereby, all of which the said plaintiff then had notice and consented thereto, and this the said defendants are ready to verify, wherefore they pray judgment," etc.

4. In substance, that at the end of each month the plaintiff has been paid divers sums of money, amounting, *to-wit*, to all the money in the declaration mentioned, in full satisfaction and discharge of all the causes of action mentioned, and which payments plaintiff accepted in full satisfaction and discharge.

"5. And for a further plea in this behalf, as to so much of the rent as is alleged in said declaration to be due for the use of the premises in said declaration mentioned, since the first day of January, A. D. 1869, the said defendants say, *actio non*, because they say that after the alleged making of the said indenture in said declaration mentioned, and on or about the first day of January, A. D. 1869, the said plaintiff, with the assent of the defendants, leased the said premises to John K. Van Doorn, for the sum of two hundred dollars per year, or sixteen and two-thirds dollars per month, and accepted the said Van Doorn as his tenant in lieu of and substitution for all previous lessees of said premises; and that the said Van Doorn took possession of the said premises under and by virtue of the said lease, and has since paid to said plaintiff all of the said rent due under and in pursuance of the said lease to him, as aforesaid, and the said plaintiff accepted and received

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the said rent for the use of the said premises from the first day of January, 1869, until the said premises were surrendered to said plaintiff under and in pursuance of the said lease last above mentioned, from the said Van Doorn in full satisfaction thereof, whereby the said indenture in said declaration mentioned, was annulled, canceled, and set aside, and the said defendants, if ever bound thereby, were released therefrom, and this," etc.

6, 7. These were the same as the preceding, except as to name of new lessee.

8. In substance, as to rent since January 1, 1869, *actio non*, because on that day the indenture sued on was canceled by reason of plaintiff leasing the premises to other agents of the Order of Good Templars at two hundred dollars per annum rent, to which the defendants assented.

9. Sets up a promise to reduce the rent from a certain time.

10. Alleges that, on November 1, 1869, defendants surrendered the unexpired term to plaintiff, which he accepted.

11. Alleges that plaintiff caused defendants to be notified, in substance, that when the premises should be vacated he would thereafter claim no rent, and that defendants, relying on this, caused the premises to be vacated on the first day of November, 1869, and the plaintiff to be notified thereof, who made no objection, and that defendants since failed to occupy the premises, and charges the facts as an estoppel to demand rent after November 1, 1869.

The plaintiff filed general and special demurrers to pleas 2, 3, 4, 5, 6, 7, 8, 9, and 11. The court sustained the demurrer to all of such pleas except the second and fourth. The ninth was amended and replications filed to fourth and ninth as amended, and to tenth.

On the trial the court instructed the jury, at the instance of the plaintiff:

1. The court instructs the jury, at the instance of the plaintiff, that the lease read in evidence is the deed of the de-

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fendants in their individual capacity, and not of the alleged lodge of Good Templars, or any other association or corporation.

2. If the jury believe, from the evidence, that the plaintiff and defendants executed the lease in controversy, and that the defendants received possession of the premises therein described, then the defendants are liable to pay the plaintiff the amount of the rent accrued thereon up to the commencement of this suit, deducting such payments as are proven by the evidence to have been made thereon, unless the jury believe from the evidence that the said lease has been canceled, surrendered, or modified by further valid agreement between the parties to said lease.

3. In respect to the alleged surrender of the premises in controversy to the plaintiff, the jury are instructed that no such surrender could take effect unless the plaintiff, by himself, or by his authorized agent, accepted such surrender; and although the jury may believe, from the evidence, that the defendants vacated the premises in controversy, and gave notice thereof to the plaintiff, yet this would not exonerate them from the payment of rent, unless assented to by the plaintiff.

4. The jury are instructed, that in order to constitute a valid surrender of a lease, there must be an acceptance by the lessor of the offer of the lessees to surrender the same; and the jury are further instructed, that there is no evidence before them of any acceptance by the plaintiff in this case of the alleged offer of the lessees to surrender the same, and if the jury believe, from the evidence, that the lease in controversy was executed by the plaintiff and defendants, then the jury should find for the plaintiff, for the time during which they may believe, from the evidence, that the rent has remained unpaid, at the rate of three hundred dollars per year, or of two hundred dollars per year, depending on whether the jury believe, or do not believe, from the evidence, that the amount of rent was modified and reduced by agreement between the plaintiff and the witness, J. K. Van Doorn, as testified to by him.

Opinion of the Court.

The errors assigned are, on the sustaining a demurrer to appellant's second and third amended pleas, and to pleas six, seven, eight, and eleven.

Messrs. MOORE & THOMPSON, for the appellants.

Mr. GEORGE W. FOGG, for the appellee.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

There can be no doubt that the defendants in this case are personally liable for the rent. It is true, they are described in the lease as "trustees of Quincy Lodge No. 139, I. O. of G. Templars," but this is merely "*descriptio personarum*." They execute the lease as private individuals, and in the body of the instrument covenant personally to pay the rent. The point is too plain for argument, and the circuit court decided properly in refusing to receive evidence *dehors* the lease, as to the intent of the parties.

The only material error in this record is in sustaining the demurrer to the fifth, sixth, seventh, and eighth pleas. The fifth set up a new lease of the premises by the appellee to Van Doorn, a taking of possession and payment of rent by him, and his acceptance by the appellee as his tenant in lieu and discharge of the appellants, and with their consent. This was pleaded as a defense to the recovery of rent that had accrued after January 1, 1869, when it is alleged this arrangement was made, and to that extent was a complete defense. The objections urged to the plea on the ground of its uncertainty, are not well taken. The sixth, seventh, and eighth pleas were the same in substance, merely alleging the new lease as running to a different person, in each plea. For the error in sustaining the demurrer to these pleas, the judgment must be reversed.

Objection is taken to a statement made by the court, in one of its instructions, to the effect that there was no evidence that the plaintiff had accepted a surrender of the lease. It is not

Opinion of the Court. Syllabus.

customary in this State for the court to tell the jury that any fact has or has not been proven, where any evidence has been admitted bearing upon the point, except where a question of law is involved, as in the proof of title. The proof, however, was wholly insufficient to show an acceptance of a surrender; and as this statement worked the appellants no prejudice, it would not be a ground of reversal. We reverse solely for the error in sustaining the demurrer.

Judgment reversed.

LAWSON G. CARTER

v.

SARAH CARTER.

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27a	398
62	435
128	439
62	439
171	639

1. *DIVORCE—desertion.* Where the wife has absented herself from the house of her husband for more than two years before suit is brought for divorce, she must show, by a preponderance of evidence, that she was justified in so absenting herself, in order to prevent her husband from obtaining a divorce for such cause.

2. *SAME—conduct justifying desertion.* To justify a wife in leaving her husband, and absenting herself without giving him cause for divorce after the statutory period, it seems that his conduct must have been such as to authorize a divorce in her favor.

3. *SAME—cruelty.* On the trial of a bill by the husband, and cross bill by the wife, for divorce, where the husband relied on desertion for the space of two years, and the wife charged him with extreme and repeated cruelty, and adultery, it appeared that the husband had made demonstrations of personal violence when highly excited by great provocation and wanton insult on the part of the wife, but committed no personal violence in fact; and it also appeared that the wife provoked the difficulty as a pretext for separation, and that the husband was a man of good disposition, a good citizen, and truthful: *Held*, that in view of the provocation, the acts of the husband were not such extreme cruelty as to entitle the wife to a divorce, or justify her abandonment of her husband.

4. *ADULTERY—proof of.* A husband, after his wife left him, employed a widow woman to keep house for him, and, to avoid scandal, kept during the time a hired girl in the house, and it appeared that such help was nec-

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essary to enable him to carry on his farm. The wife, in a suit for divorce, attempted to prove that the widow's character for chastity was bad, to show that her husband was guilty of adultery with this woman, but no improper acts between them were proved: *Held*, that evidence of the general character of such widow was inadmissible to prove adultery; and that if her character had been shown to be bad, her employment, under the circumstances, was no evidence of adultery on the part of the husband.

5. The fact that the husband, after his wife left him, employed a man and his wife to come and stay at his house for a few days, although the character of the man's wife, for virtue, may not have been good, does not prove the husband's adultery, unless it is also shown that they were employed for improper purposes.

6. ADULTERY. The charge of adultery must be shown by proof of acts and circumstances that convinces the mind by a preponderance of its weight, and not by mere suspicion or conjecture from vague or indefinite circumstances pointing to no specific time, place, or act. Hence, evidence that defendant's character for virtue was not good, is not admissible on a charge of adultery. Nor is hearsay, or neighborhood rumor and gossip.

7. SAME. The fact that a husband, during his wife's absence, visited, on one or two occasions, female friends, and at one or more times was seen riding in a carriage with females, when the attendant circumstances failed to show that he acted improperly on such occasions, does not prove his adultery.

8. SAME—*proof of*. When immorality or wrong is imputed, such as adultery, it must be established by at least a preponderance of proof; and when the facts or circumstances relied upon to establish the same, may as well import innocence as guilt, they must be held to import innocence.

9. DIVORCE—*desertion, instruction*. On the trial of the issues in a suit by a husband for divorce, on the ground of the wife's desertion, the court, at the instance of the wife, instructed the jury that they should determine, from all the facts and circumstances, what constituted a reasonable cause of abandonment: *Held*, that although the court, in other instructions, properly stated what acts of the husband would constitute reasonable cause, the court erred in giving this, as it was uncertain which the jury followed.

APPEAL from the Circuit Court of Adams County; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was a bill for a divorce brought by appellant, in the McDonough circuit court, and taken by change of venue to the circuit court of Adams county. Appellee filed a cross bill, also claiming a divorce on the ground of cruel treatment

Statement of the case.

and adultery on the part of the complainant. The testimony is lengthy, but its substance is stated in the opinion of the court.

The complainant asked the court to give the following instructions:

1. The jury are instructed, that it is necessary for either party, in this case, to establish their respective allegations presented by their pleadings by a preponderance of the evidence in the case.

2. The jury are further instructed, that the only issue presented by the pleadings in this case for your consideration is, whether or not the complainant and defendant were living together as husband and wife, in the county of McDonough, and State of Illinois, on the 3d day of February, A. D. 1868, and whether or not, on that day, the defendant wilfully, and without just or reasonable cause, deserted the complainant and his said home, and whether or not the defendant had wilfully remained absent therefrom, without just or reasonable cause, for the space of two years prior to the filing of the complainant's bill for a divorce.

3. The jury are further instructed, that it is wholly immaterial in this case, whether or not the complainant has committed adultery with Margaret Sailors, or any other woman, since the filing of his bill for a divorce.

4. The jury are also instructed, that adultery can not be presumed, but must be alleged and clearly established by a preponderance of the evidence; and unless the jury clearly believe, from the evidence in the case, that the complainant did, prior to the time of filing his bill herein, commit adultery with Margaret Sailors, or Mrs. Lockhart, or Mrs. Neal, the defendant was not justified in leaving complainant, and remaining absent for the space of two years immediately prior to the filing of his bill of complaint herein, simply because of any suspicion of adultery which defendant might entertain, as between complainant and these women, or either of them, and no more.

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5. The jury are also further instructed, that the law does not allow the jury to presume the adultery of the complainant where the facts or circumstances relied upon to establish the same may be as well attributed to an innocent intent or motive as a guilty one.

6. The jury are instructed, that if they believe, from a preponderance of the evidence, that at the time defendant left complainant (if she did leave at all), complainant was at the head of a family, and living upon and carrying on a farm, and that he continued to so reside there up to the time of filing his bill herein, he had a perfect right to employ a housekeeper or housekeepers during that time, and to associate with them, or to visit his neighbors and female acquaintances.

7. The jury are instructed, that if they believe, from the evidence in this case, that Mrs. Nancy Cooper was asked a question, upon her first examination in this case, which was broad enough to have enabled her to have related the conversation with complainant, which she relates in her second deposition as to complainant having committed adultery, and that on said first examination she neglected to testify as to said conversation, such neglect is a circumstance to be taken into consideration by the jury in determining what weight to give to her evidence.

8. The jury are instructed, that the evidence of the witness, Mrs. Nancy Cooper, in her second deposition as to the admission of complainant to her, that his wife, meaning the defendant, had forced him to commit adultery, cuts no figure in this case, unless the jury believe, from a preponderance of the evidence, that complainant had committed adultery with Mrs. Margaret Sailors, or Mrs. Neal, or Mrs. Lockhart prior to the time of filing his bill of complaint.

9. The jury are instructed that it is necessary for the defendant to prove, by a preponderance of the evidence, that the complainant actually committed an act, or acts of personal violence to the person of the defendant prior to the time of the alleged desertion, and that threats of violence, abusive

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language, or violent sallies of passion are not such violence as will justify a desertion.

10. The jury are instructed, that such cruelty as would authorize a married woman to leave the house or home of her husband must be acts of physical violence upon her person, inflicted by him, or such demonstrations of actual violence made by him toward her as would induce a well-grounded fear in a reasonable mind that such violent injuries would be inflicted upon her by her husband, in case she remained, and that abusive language or mere assault, without battery, does not constitute such cruelty as is contemplated by law.

12. The jury are instructed, that in determining the weight to be given to the evidence of the witnesses in this case, they are authorized to consider the relationship, if any, to the parties herein, their temper, feeling, or bias, if any is shown, their demeanor while testifying, their means of information, and to give such credit to their evidence as under all the circumstances said witnesses shall seem entitled to.

13. If the jury believe, from a preponderance of the evidence, that the defendant deserted the complainant at two different times before the 3d day of February, A. D. 1868, even with a justifiable cause, and subsequently returned each time to complainant, and lived with him as his wife up to the 3d day of February, A. D. 1868, then all such former acts of violence which took place prior to the time she last returned, in the year A. D. 1863, if she did so return, were, in the law, condoned by her; and unless the jury further believe, from the preponderance of the evidence, that the defendant received such personal violence at the hands of the complainant as would justify her desertion, subsequent to said time of her return, in A. D. 1863, if she did return, and live with complainant up to February 3, A. D. 1868, inclusive, the jury should find the allegations of cruel treatment against the defendant.

The court gave all of said instructions, except those num-

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bered 5, 9, 10, and 13. At the request of defendant the court gave the following instructions :

2. That if the jury believe, from the evidence, that complainant, before the separation of the parties, was guilty of extreme and repeated cruelty toward defendant for the space of two years or more, that defendant was justified in leaving him, and the jury should find the issues for the defendant.

3. That if the conduct of complainant was such toward defendant, before the said separation, as to induce, in the mind of a reasonable woman, a well-grounded fear of her life, or of great bodily injury, if she remained and lived with said complainant, and that she was actuated solely by such fear during the two years immediately after said separation, being such as would be inspired by all the circumstances in the mind of a reasonable woman during all that time, then the jury should find that the defendant is not guilty of the wilful abandonment, without reasonable cause, as charged in the bill of complaint.

5. That facts tending to show that the complainant has been guilty of adultery with Mrs. Sailors, or any other woman, either prior to the separation spoken of by the witnesses, or after that time, and before the commencement of this suit, are proper for the consideration of the jury in determining the issues in this case.

6. The only issue for the jury to try in this cause is, whether the defendant deserted or absented herself from the complainant, without any reasonable cause, for the space of two years prior to the commencement of this suit, and what constitutes such reasonable cause of abandonment, is a matter to be determined by the jury, from all the facts and circumstances in evidence in the case.

The jury found the defendant not guilty of wilful desertion without reasonable cause.

The complainant entered a motion for a new trial, which was overruled.

Opinion of the Court.

Messrs. BAILEY & COLE, for the appellant.

Messrs. STEWART & PHELPS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellant filed a bill in the McDonough circuit court against appellee to obtain a divorce. The bill alleged wilful desertion, without any reasonable cause, for the space of more than two years. Appellee answered, and filed a cross bill, setting up, as a justification, extreme and repeated cruelty and adultery on the part of the husband. A replication was filed to the answer, and an answer to the cross bill, denying the charge of cruelty and adultery. A trial was had resulting in favor of defendant, whereupon the court dismissed the original bill, and, under the cross bill, decreed her an annual allowance of three hundred dollars, payable semi-annually, as a separate maintenance. Complainant has appealed to this court and asks a reversal upon the ground that the evidence does not sustain the verdict and decree.

We have examined the evidence with much care, and are constrained to hold that the objection is well taken. It is not contested that appellee absented herself from the home of appellant for more than two years before the original bill was filed, and it devolved upon her to show, by a preponderance of evidence, that it was justified. While appellee testifies to a number of acts of cruelty, extending over a series of twenty-seven years, her story seems to be extremely improbable. That she would have remained with appellant, and make no complaint, or even communicate to any person in the neighborhood, the fact that appellant had, on more than one occasion, administered to her poison, and had attempted to shoot her and stealthily attempted to cut her throat, and not at the time have left him and communicated the fact to the neighbors, is so extremely improbable that we can not give it credence unless it was supported by corroborating evidence. It has every ap-

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pearance of the vagaries of a crazed or distempered imagination.

Again, these charges are totally denied by appellant. He is explicit and positive in his contradiction of each and all of these charges. When she says, that he, while riding in a carriage with her, attempted to drive over a precipice, or such a place as would have produced her death, she does not seem to remember that it involved the destruction of his own life. As to all of these charges we think them so extremely improbable that, uncontradicted, we could not hold that they would have justified the decree, as some of them are unreasonable, and her conduct seems to contradict all of them. Had such attempts been made upon her life she would, undoubtedly, have left appellant and have made it known to her friends, and commenced legal proceedings. That her imagination is diseased seems to be more than probable. Her account of being choked in her sleep until life was almost extinct, and not be aware of the fact until she, next day, saw the prints of fingers on her neck is improbable. Such evidence seems to be entirely worthless.

As to the difficulty that occurred at the time when the separation took place, it appears that appellant was highly excited, and was acting under great provocation. When he was so wantonly insulted by appellee it was but natural that he should lose his temper, and he may not have restrained it, and have avoided its energetic manifestations to the extent that he should, and others might have done. But when he simply informed appellee that he did not want her to sell any more honey, for her to reply that he lied, was well calculated to throw the coolest and best balanced temper off its balance. So far as we can see, the insult was unprovoked, unexpected, and entirely wanton. And it was not to be expected that appellant would remain calm under such a provocation. He may have made demonstrations that were violent, and even improper, in a man of strong will and self-government, but when the weakness of human nature is considered, we are not prepared to hold, that, under the provo-

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cation, it was extreme cruelty. He did no personal violence to appellee, although he made demonstrations that may have induced her to believe she was in danger; but it must be remembered that she provoked it, and seems to have been seeking to induce such action as would afford an excuse for a separation, as such a thing had been previously spoken of by the parties.

But in this altercation, appellee does not pretend that she received any personal injury, but says he struck at, and attempted to kick her. This, appellant denies, in the most emphatic terms, as well as all other specific charges. Again, persons who lived in the family all concur in saying, so far as they saw, he treated her kindly and properly. His neighbors speak well of him as a man of good disposition, a good citizen, and a truthful man. It would be strange, if he had treated appellee as she claims, that their children, persons living in the family, and their neighbors, with whom they had lived for years, never had discovered the fact.

To have been justified in leaving her husband, his conduct should have been such, as if continued for the statutory period, would have authorized the decreeing of a divorce. In the attempt to show such facts we think appellee has wholly failed in her proof. That an altercation occurred is true, but it was sought and produced by her own acts. Appellee having deserted appellant, without reasonable cause, for the space of more than two years before the bill was filed, he was entitled to a divorce, unless it is shown that he was guilty of adultery, as charged in the cross bill and answer.

There was much testimony taken to prove that appellant was guilty of adultery with different women. In this we think there was an entire failure. It is true, that after appellee left, appellant employed a widow to keep house for him, but as a matter of precaution against scandal he also kept in the house a hired girl during the time. And no improper acts between them were proved. Much testimony was taken that, at most, could only raise a suspicion. An attempt was made to show that this woman was not virtuous, but her

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character seems to have been sustained by those who were most intimately acquainted with her, and who lived in her neighborhood.

But had the evidence shown that her character was not good, that of itself would not have proved the charge. The mere fact that appellant employed a housekeeper, which was rendered necessary to enable him to carry on his farm by appellee's desertion, does not prove adultery. Nor do we find other evidence in this record from which it can be reasonably inferred. The fact that he employed a man and his wife to come to his house a day or two, although the wife's character for virtue may not have been good, does not prove adultery by appellant. The labor they were hired to perform seems to have been necessary and proper, and until shown to have been for improper purposes, should not fix the charge of adultery on appellant.

The evidence of the general character of the widow he employed, even had it shown that it was bad, was not admissible to prove adultery. Nor was the evidence introduced for the purpose of showing that appellant's character for virtue was not good. This is a specific charge, and must be proved, like any other fact, by either positive or circumstantial evidence, and not by hearsay or mere rumor and gossip of the neighborhood. If guilty, the charge must be established by evidence of acts and circumstances that convinces the understanding.

Nor do we see that the fact that he may have, during the period his wife was absent, visited, on one or two occasions, female friends, or at one or more times been seen riding in a carriage with females, prove the charge. No attendant circumstances indicate that he acted improperly on those occasions, and we can not infer adultery from them. Nor do we see, from the entire evidence in the record, that the charge is established. It should be proved, and by evidence that is legitimate and convinces the mind by a preponderance of its weight, and not by mere suspicion or conjecture from vague, indefinite circumstances, pointing to no specific time, place, or

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act. Such loose evidence can not, even if it were admissible, prove the charge; and there is no legitimate evidence upon which to base the conclusion that he committed adultery.

We now come to consider the instructions. Appellant asked and the court refused to give this instruction:

“The jury are also further instructed, that the law does not allow the jury to presume the adultery of the complainant where the facts or circumstances relied upon to establish the same may be as well attributed to an innocent intent or motive as a guilty one.”

No objection is perceived to this instruction. It announces a correct rule of law, and is free from even verbal criticism, unless the word “if” should be substituted for the word “where.” But it is the undoubted rule of law, that where immorality or wrong is imputed, it must be established by at least a preponderance of proof. And when the evidence may as well establish innocence as guilt, the jury should always adopt the former rather than the latter hypothesis; and the same is manifestly true where a violation of the marital rights is charged by the commission of an act that degrades the parties and inflicts great wrong upon society. When such a charge is made it involves the character of both parties to the offense, and the character of the woman to whom it is of priceless value; she should not be found guilty on evidence which may as well import innocence as guilt. All persons are presumed to be innocent until proved guilty, and to hold that act, which may as reasonably be attributed to an innocent intent, as a guilty act, would impair if it did not abrogate the rule; it would authorize the finding the existence of a fact on evidence that was in equipoise. It was error to refuse this instruction.

The sixth of defendant's instructions should have been modified. In the previous instructions the court very properly told the jury what acts on the part of the husband would constitute reasonable cause for appellee's leaving her husband; but in the latter clause of the sixth instruction, the acts and cir-
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cumstances which would constitute a justification, are left to the determination of the jury. Now we can not see which the jury followed; and we can see that if they followed the latter, it must have operated to appellant's prejudice, and accounts for the verdict which they returned. In this there was error; for the errors indicated the decree of the court below is reversed and the cause remanded for further proceedings, in conformity to this opinion.

Decree reversed.

CHARLES G. MAURO

v.

WESLEY PLATT.

1. ADMISSIONS—*weight as evidence.* It is not true that, under all circumstances, admissions of a party are weak evidence; sometimes they are the strongest and most satisfactory species of evidence. It is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled; and in case of a conflict the court has no right to tell the jury that an admission is a weak kind of evidence.

2. SAME. Where the authority of one to employ the plaintiff as an attorney was disputed, and the evidence on that point conflicting, and it was proved by two witnesses that they were present and heard defendant authorize the employment of plaintiff, the circuit court instructed the jury that, while it was competent for plaintiff to show the admissions and statements of defendant, as tending to show his liability, yet the law regards such admissions as a weak kind of evidence: *Held*, that the instruction was erroneous, because the testimony was not of admissions, but of an important fact, and in such a case it was for the jury alone to determine the weight of the evidence.

APPEAL from the Circuit Court of Morgan County; the Hon. C. D. HODGES, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for the appellant.

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Opinion of the Court.

Messrs. BROWN & EPLER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was an action of assumpsit, for services as an attorney and counselor at law in the defense of John Platt, charged with a felony, and tried and acquitted in the criminal court of the city of St. Louis.

It was in proof by John B. Higdon, another attorney of that court, that he was employed by John Platt to defend him, and that his brother, Wesley Platt, the appellee herein, authorized him to employ appellant to assist him in the defense. Under that authority he employed appellant, he having fully stated to appellee the reasons why he wished appellant to be associated with him. Appellee told him to get him, by all means ; appellant made a successful defense for John Platt, and, on failure of appellee to pay him, brought this suit.

Both John Platt and Wesley Platt contradict Higdon, and testify they nor either of them ever authorized or requested him to employ appellant.

John Kinsella, a witness for appellant, testified he was present on a certain occasion, and does not know appellee employed appellant in person to defend his brother, but he does know that he authorized John B. Higdon to employ him. Higdon's health was bad at the time.

Appellant testified he was employed by Higdon, he professing to act by express authority of appellee.

Lawrence, the magistrate before whom John Platt was brought, testified that appellee in his presence authorized Higdon to retain appellant, and that he would pay the bill ; that others had recommended Madill, but Higdon preferred appellant ; that appellee instructed Higdon to employ such counsel to defend his brother, and that he would pay for the services.

Under this state of the evidence the court, at the instance of appellee, gave the jury this instruction :

"The court instructs the jury, for the defendant, that while

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it is competent for the plaintiff to introduce in evidence the admissions and statements of the defendant in this case tending to show his liability to the plaintiff, yet the law also regards such admissions as a weak kind of evidence, owing to the liability of persons testifying to admissions to be mistaken, or misunderstand the statements of such person whose admissions are offered as evidence."

The evidence, as it stood, and it was legitimate evidence, slightly preponderated in favor of appellant. For the court to tell the jury that his evidence consisted of admissions of defendant, and was weak evidence, was wrong; for, in the first place, the witnesses did not testify to admissions, but to a fact, and an important one, and that was the authority given by appellee to Higdon to employ appellant as counsel in the cause.

The court, in this instruction, perverted the evidence, or, rather, misnamed it, and then told the jury it was weak evidence. It by no means is true that, under all circumstances, admissions are weak evidence. Sometimes they are the strongest and most satisfactory species of evidence. It is the peculiar province of the jury to weigh the evidence, and give to it the consideration to which it is entitled. Where it is conflicting, it is not proper for the court to throw its weight against one of the parties by telling the jury his evidence is weak. By so doing, the province of the jury is invaded, and, if exception is taken, must reverse the judgment. *Frizzell v. Cole*, 42 Ill. 362.

For this error the judgment is reversed and the cause remanded.

Judgment reversed.

 THE PEOPLE *ex rel.*

v.

JOSEPH B. BARGER, county clerk, etc.

1. CONSTITUTIONAL LAW—*exemption from taxation*. The first section of the ninth article of the charter of Shawneetown, in terms, purported to ex-

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empt the inhabitants of that city from all State taxes for the period of twenty years, and required the levy of a tax, by the city, on the property of the inhabitants, equal to the tax released by the State, to be used exclusively in constructing a levee to protect the city from overflow: *Held*, that so far as the section exempted the property of the inhabitants from State taxes, it was clearly in conflict with the second section of the ninth article of the constitution of 1848, and therefore void.

2. *SAME.* The mere fact that the city council was authorized to levy a tax equal in amount to the State tax released, for local improvements, does not change the material fact of an attempt to release the right of the State to tax the inhabitants for State purposes; and the tax for levee purposes is in no sense a State tax.

3. *SAME—power of legislature to exempt.* Under the constitution of 1848, the legislature had not the power to exempt a portion of the inhabitants of the State in any locality from State taxes, and impose the entire burden upon the remaining portion.

4. *SAME—commutation of taxes.* The case of the *Illinois Central R. R. Co. v. County of McLean*, 17 Ill. 291, holding that a commutation of taxes in that case was constitutional, is based upon the principle that the proportion of the earnings of the company required to be paid to the State in lieu of taxes, was equal to the burden of the taxes released. The case can be supported on no other principle.

5. But when the State receives nothing in consideration for releasing the inhabitants of a city from State taxes, and the tax imposed in lieu thereof is purely for local purposes, in which the people of the State at large have no benefit, it can not be regarded as a commutation.

6. *SAME—exemption for charitable purposes.* The words "charitable purposes," in the third section of the ninth article of the constitution of 1848, which provides that "the property of the State and counties, both real and personal, and such other property as the general assembly shall deem necessary for schools, religious and *charitable purposes*, may be exempt from taxation," will not be construed to include the building and construction of a levee for the protection of the private property of the citizen. Under this clause, the right to collect a State tax in a locality can not be released for a series of years, and an equal tax collected to build a levee by a city in lieu thereof.

Mr. W. BUSHNELL, Attorney General, for the people.

Mr. A. D. DUFF, for the respondent.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The first section of article nine of the charter of Shawnee-

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town, in terms, purports to exempt the inhabitants of that city from all State taxes for a period of twenty years. Private Laws 1861, p. 272.

The respondent, who is the county clerk of Gallatin County, acting under this law, refused to extend the State tax for the year 1871. It is claimed, on behalf of the relators, that this section of the city charter is in conflict with the constitution of the State, and therefore void. The object of this proceeding is to compel the respondent to extend the State tax for the year 1871 on the property of the inhabitants of said city.

The counsel for the respondent suggests two inquiries: first, does the charter, when tested by the fixed rules of interpretation and construction of statutes, exempt the inhabitants of the city of Shawneetown from taxation? And, second, if they are so exempted, is such exemption a plain and obvious violation of the constitution?

Reluctant as we always are to hold any law enacted by the general assembly to be unconstitutional, we feel constrained to return an affirmative answer to both of these questions.

The words used in the act under consideration, have no doubtful meaning, and if taken and considered in their ordinary and legal meaning, they will bear no two constructions. It is expressly provided that the "inhabitants of said city are hereby exempt from State tax for twenty years." The plain and obvious meaning of the words used is, that the State, by this act of the general assembly, undertook to release its right to tax the inhabitants of said city for State purposes for a period of twenty years. The terms used to express that intention are unambiguous, and if the general assembly possessed the constitutional power to create such exemption, they would doubtless be effective for that purpose.

It is conceded by counsel, that this section will bear this construction, unless its meaning is aided by the context. By the same section, the city council is authorized and required to levy annually a tax on the property of the inhabitants of said city equal in amount to the "tax which would have inured

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to the State from time to time, had this exemption not been made;" which tax, when so levied and collected, it is provided, shall be exclusively used for the purpose of building a levee to protect the city from overflow.

We do not perceive how this provision changes the meaning of the words quoted from the first clause of the section, or gives any different view of the expression of the legislative will. The patent fact remains unchanged, that the legislature did, in fact, exempt the inhabitants of said city from all State taxes for a certain period, and did release its right to impose such tax for State purposes during that period.

The mere fact that the city council is authorized to levy a tax, equal in amount to the State tax, for the several years of the period named, for the purposes of local improvements, does not, and can not, change the meaning of the words used, or change the material fact that the State has attempted, through this act of the legislature, to release its right to tax the inhabitants of said city for State purposes for the entire period named.

The tax to be levied by the city council, under the provisions of this act for "levee purposes," is in no sense a State tax, and, by no fair construction, can it be made to stand in lieu of the State tax.

It is not in the power of the legislature to exempt a portion of the inhabitants of the State in any locality from State taxes, and impose the entire burden upon the remaining portion of the citizens. If the general assembly could exempt the minority from taxation for State purposes, they could, upon the same principle, exempt the majority, and thus a minority of the citizens might be made to bear the entire burden of the expenses of the State government.

The second section of the ninth article of the constitution of 1848, requires that the "general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his or her property."

It is insisted, for the purpose of avoiding this provision of the constitution, that, if the inhabitants of the city are ex-

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empted from one tax, the State, by the same law, imposes another, equal in amount, upon the same people and property, and that this is a mere substitution of one tax for another. The case of the *Illinois Central Railroad Company v. The County of McLean*, 17 Ill. 291, is cited as sustaining this view of the law. The doctrine of that case does not aid the view of the law presented by the counsel for the respondent.

That case holds that it is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum, and that the provision in the charter of the Illinois Central Railroad Company, exempting its property from taxation upon the payment of a certain portion of its earnings was constitutional. The case proceeds on the principle that the proportion of the earnings of the company to be paid to the State is equal to the burden of the State tax imposed on the citizens and other corporations in the State, which is thought to answer the requirements of the constitution, that "every person or corporation shall pay a tax in proportion to his or her property." The case can be supported on no other principle.

In the case at bar, the State received nothing in consideration for releasing the inhabitants of the city of Shawneetown from taxation, for State purposes, and hence the inhabitants do not pay a State tax in proportion to the value of their property. The tax imposed in lieu of the State tax is purely for local purposes, from which the citizens of the State at large derive no benefit whatever.

It is sought to sustain this section of the city charter on the ground that it is a mere appropriation of the State tax of the inhabitants of Shawneetown, for a period of years, to aid them in the construction of a levee, on the principle of the case of the *People ex rel. v. Miner*, 46 Ill. 384. We think this can not be done. In that case there was no attempt to suspend the levy of the tax for State purposes, and, in fact, it was actually levied and collected under the general revenue laws of the State, but it was held to be within the constitutional power of the legislature to stop the tax, *in transitu*, be-

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fore reaching the State treasury, and to appropriate it to aid in the construction of certain improvements in the American bottom. The case at bar does not come within the letter or spirit of that decision.

Unless the exemption sought to be created in favor of the inhabitants of Shawneetown, by the first section of their charter, is authorized by the third section of the ninth article of the constitution of 1848, it is clearly in conflict with that instrument. That section provides, that "the property of the State and counties, both real and personal, and such other property as the general assembly shall deem necessary for schools, religious and charitable purposes, may be exempt from taxation." While it is true that the words "charitable purposes," as used in the constitution, may have a very broad and comprehensive meaning, and may include provision for all classes of citizens, such as founding hospitals for the insane, the deaf and dumb, and the blind, and other kindred and humane institutions, we do not think they were intended to have as broad a meaning as that insisted upon by the counsel for the respondent. We are asked to extend the meaning of the words "charitable purposes" so as to make them include the building and construction of a levee for the protection of the private property of the citizen. This can not be done. We can not believe that the framers of the constitution of 1848 ever intended those words to have any such meaning, or to use them in the extended sense that the words "charitable uses" may sometimes have been used in the common law.

It has always been the doctrine of this court to presume in favor of the constitutionality of any law enacted by the general assembly, unless it is in plain and obvious conflict with the constitution.

In the present instance we think that the first section of the ninth article of the charter of the city of Shawneetown, which attempts to exempt the inhabitants of said city from State taxes, for a period of twenty years, is so clearly in conflict with the constitution of 1848, under which it was en-

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acted, and therefore of no validity, that it becomes our imperative duty to award the peremptory writ of mandamus, to compel the respondent to extend the amount of the State tax for the year 1871, as prayed for in the petition filed herein, which is accordingly done.

Peremptory writ of mandamus awarded.

THE REAPER CITY INSURANCE COMPANY

v.

WILLIAM R. JONES.

62	458
123	359
26a	210
62	458
129	609
62	458
45a	220
62	458
46a	487

62	458
108a	*551
62	456
204	*846
62	458
114a	*407

1. *INSURANCE—waiver of condition.* A clause in a policy of insurance sued on made it void if gunpowder was kept in the building insured without written permission, and it further declared nothing less than a distinct agreement, indorsed on the policy, should be construed a waiver of any condition or restriction. The assured, at the time of the loss, had a few pounds of gunpowder kept with the knowledge and express permission of the local agent of the company. A previous policy had been issued by the same agent upon the same property, and all premiums had been paid and accepted by the company, and the agent knew that powder was kept, and expressly permitted it without calling the attention of the assured to this clause in the policy: *Held*, that the failure to have the written consent of the company indorsed on the policy, under such circumstances, did not render it void, but that the condition would be regarded as waived.

2. As the provision of forfeiture was made solely for the benefit of the company, it might waive the condition, and as it performs its business through agents, their acts must often operate as a waiver of conditions in a policy. The company being presumed to have knowledge of the facts through their agent, by taking the money of the assured, and giving him no notice that the policy had been violated, or that the contract must terminate, before his loss, will not be allowed to resist payment for such cause. Such an act would be a fraud and a deceit, which the law will not sanction.

3. *SAME—notice of conditions.* When the agent of an insurance company takes an application of insurance, knowing that the assured is keeping interdited articles prohibited by conditions usually printed in small type and difficult to read, and gives no notice to the assured of the stringent charac-

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ter of such conditions, but consents to the keeping of such articles, the company will be held to have waived the right of forfeiture.

APPEAL from the Circuit Court of Sangamon County ; the Hon. JOHN A. McCLEARNAND, Judge, presiding.

Messrs. J. C. & C. L. CONKLING, for the appellants.

Messrs. STUART, EDWARDS & BROWN, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court :

One clause in the policy sued on, made it void if gunpowder was kept in the house without written permission ; and it was further declared, that nothing less than a distinct agreement, indorsed on the policy, should be construed as a waiver of any condition or restriction.

The assured, at the time of the loss, had on hand a few pounds of gunpowder, kept with the knowledge and express permission of the agent of the company. A previous policy had been issued by the same agent upon the same property ; all premiums had been paid upon both, and accepted by the company ; and the agent knew that the powder was kept, and expressly permitted it, without calling the attention of the assured to the particular condition of the policy.

Did the failure to have the consent of the company indorsed upon the policy, under such circumstances, render it void ? This is the only question in the case.

The clause in the policy making it void if gunpowder was kept in the store was for the benefit of the company. It might waive the effect of the condition ; and, as it performs its business through agents, their acts must often operate as a waiver of the conditions in a policy. During the existence of the two policies to the assured, the company must have been cognizant of the acts of its agent, and of the privileges which were granted to the assured. Yet the premium was promptly paid and duly received by the company ; and no

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notice was given that the policy had been violated, or that the contract must terminate; but the assured was authorized, by the recognized agent, to continue the storage of the powder in the store. With a full knowledge of all the facts, the company takes the money of the assured, with the determination, at the time, to resist the payment of loss, should any occur. This was not only a fraud, but a deceit, which the law can never sanction. The defense set up is destitute even of the semblance of justice.

The company was chargeable with the act of the agent in giving permission to keep the powder; and as the provision for forfeiture was made solely for the benefit of the company, it must be regarded as having waived it, upon the principle that what is exclusively for its benefit it can enjoy or not as it pleases.

Some of the interdicted articles are gunpowder, saltpetre, nitrate of soda, petroleum, benzine, gasoline, spirit of gas, or any burning fluid. Such conditions, printed, as they usually are, in the smallest type, and read with great difficulty, are but traps when the attention is not called to them. There is scarcely a housekeeper in the State who does not keep on hand some one or more of the prohibited articles. With knowledge of the fact on the part of agents, and when no notice is given of the stringent character of the condition, but specific authority is granted to continue to keep the article, the company waives the forfeiture.

The principles enunciated in the following cases control this case: *Atlantio Ins. Co. v. Wright*, 22 Ill. 462; *N. E. Fire and Marine Ins. Co. v. Schettler*, 38 Ill. 166; *Com. Ins. Co. v. Spankneble*, 52 Ill. 53; *Phoenix Ins. Co. v. Slaughter*, 12 Wal. 404.

We think that the judgment should be affirmed.

Judgment affirmed.

Syllabus.

MESHACH PIKE

v.

DANIEL O. CRIST *et al.*

62	461
123	513
62	461
102a	5612

1. *USURY—under guise of liquidated damages.* Where promissory notes, made up of several prior notes and dealings between the same parties, were made payable thirty days after date at ten per cent interest, and if not paid at maturity, twenty per cent after maturity, as liquidated damages, and it was shown that in the beginning of the dealings between the parties it was understood that the payee was to pay twenty per cent interest for all moneys loaned to him, if not paid in thirty days; that when the last notes were given payable in thirty days, the payee had agreed to let them run for a year; that at least three of the previous notes merged in these, were drawn in the same form; and it appeared, by the admissions of the payee, that this was a form adopted by him to obtain twenty per cent interest, without violating the statute, as he supposed: *Held*, that the twenty per cent expressed to be liquidated damages was not such in good faith, but a mere device to cover up an usurious transaction.

2. *SAME—where a purchaser may set up usury.* Where a purchaser of land from a mortgagor received a deed of warranty which, after reciting that it was subject to certain mortgages, contained this clause: "all three of which mortgages the above grantee assumes and agrees to pay, except any usurious and illegal interest in the same:" *Held*, that, as under this clause, the right of the mortgagor to an abatement of the usury entered into the consideration of the purchase as an element of the price, the grantee had the right to question the validity of the mortgages in respect to usury.

3. *SAME—interest allowed when purged.* Where a part of the principal of notes secured by mortgages was composed of usury, and an usurious rate of interest was expressed on the face of the notes under the guise of liquidated damages if not paid at maturity, the circuit court, after finding the sum actually due after deducting the usury, allowed but six per cent interest on that sum from the date of the notes, instead of ten per cent, on bill filed by the grantee of the mortgagor: *Held*, no error, as this court has adopted six per cent as that which equity requires a party seeking relief shall pay in such cases.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. HAMILTON SPENCER and Mr. O. T. REEVES, for the appellant.

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Messrs. SHACKLEFORD & POLLOCK, and WELDON & BENJAMIN, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is first to be considered whether any usurious interest entered into, and composed a part of, the principal sums of the two notes given by Ralph and Rebecca Bennett to Pike, and secured by their mortgages on the land in controversy, one for \$2039.94, bearing date January 19, 1868, and the other for \$854.23, bearing date January 16, 1869.

At the time of making the first note, Pike held a mortgage and various notes and accounts against the Bennetts, growing out of a series of former transactions between the parties of the loan of money by Pike, and a settlement was had of them, the interest calculated, and they were cancelled and given up; and in place of them, for the whole amount found due in respect to them, said note was given.

As to all the particular items which went to make up the amount of the note, the evidence is not explicit.

Without entering into what would be a tedious review of the testimony bearing upon the point, we will content ourselves with saying, that the examination of it has satisfied us, that in view of all the evidence, as well that derived from the admissions testified to, of Pike, as from the testimony in the case, of the parties, the court below was justified in finding, as it did, that usurious interest to the amount of \$180.40, was embraced in the principal sum of that note.

Still more warrant in the proofs is there, for the finding of the court that \$347.96 of usurious interest went to make up the amount of the second note for \$854.23. This note too, was composed of the aggregate amount of various smaller items; but the evidence is more satisfactory as to what they were, than in the case of the first note; the chief item of usurious interest, being interest on the former note of \$2039.94, at the rate of ten per cent for thirty days, and twenty per cent afterward.

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And this brings us to the next point in the case, whether these two notes bore an usurious rate of interest.

They were both drawn payable thirty days after date, with interest at ten per cent, and, if not paid at maturity, twenty per cent after maturity, as liquidated damages.

This court has held that an agreement to pay a greater rate of interest than that allowed by the statute, upon the amount of a note after the time of its becoming due was not in itself usurious. *Lawrence v. Cowles*, 13 Ill. 578; *Gould v. The Bishop Hill Colony*, 35 id. 324. It was, however, said, in the latter case, if a note were given due at date, or on short time, so as to induce the belief that it was only designed to evade the statute, then the rule would be different.

It was in evidence, that the understanding was, in the beginning of the transactions with Pike, that the Bennetts were to pay him twenty per cent interest for all money loaned by him if not paid in thirty days; that the reason why the money was borrowed at thirty days, was the promise of Pike, that if they could not pay at that time, they might have the money for a year. It is in proof, that at least three of the previous notes executed before the one for \$2309.94, in which they were merged, were drawn in the same precise form in respect to interest and time of payment; and admissions of Pike were in evidence which tended to show that that was a form of security he had adopted to obtain twenty per cent interest, without, as he supposed, violating the statute.

There is, it is true, in the case of the first note, and perhaps in some of the preceding ones, evidence that Bennett expected to obtain the money from a source he relied on to pay the note by the time it fell due. Nevertheless, in the light of the whole testimony, the court might well have come to the conclusion that the twenty per cent interest specified in the notes, was not in good faith liquidated damages for the non-payment of the notes at the time when they should become due, but a device to cover an usurious transaction.

Can Crist, the grantee of Ralph and Rebecca Bennett, set

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up usury against the mortgages given by the Bennetts to secure the payment of the notes?

The warranty deed from Ralph and Rebecca Bennett to Crist, of the land covered by the mortgages, after reciting that it is subject to the two mortgages in question and one other, contains the following clause, to-wit: "All three of which mortgages the above grantee assumes and agrees to pay, except any usurious and illegal interest in the same mortgages given to Meshach Pike." Under this clause, the abatement to which the mortgages might be subject, on account of usury, must be taken as having entered into the consideration of the purchase as an element in the price of the land, and by clear implication the grantee has the right to question the validity of the mortgages in respect to usury. The case comes within the rule, in that regard, as recognized in *Henderson v. Bellew*, 45 Ill. 322, and *Valentine v. Fish*, id. 462.

The court did not err in not allowing interest at the rate of ten per cent upon the amount found to be actually due upon the mortgages, and in allowing but six per cent interest.

This court has adopted the latter rate of interest as that which equity requires the complainant, seeking relief in such cases, should pay. *Farwell v. Meyer*, 35 Ill. 40; *Sutphen v. Cushman*, id. 186.

It is claimed, that even on the basis which was adopted by the court below, of purging from the principal sums of the notes, the amounts of usurious interest found to be contained in them, and allowing interest only at the rate of six per cent on the remainder, there was an error against the appellant of \$116.78, in the computation of interest on the note for \$2,309.94, of January 19, 1868. But this supposed error is based on the evidently mistaken assumption that the interest should have been calculated on the note from the time of its date, and for the first year, whereas, the first year's interest on it at the rate of six per cent, made up a part of the note for \$854.23, given January 16, 1869, and was there allowed in the amount found due upon that note.

As to the award of costs complained of, we see no reason to

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interfere with the exercise of the discretion of the court in that matter.

Perceiving no error in the record the decree must be affirmed.

Decree affirmed.

62	465
175	282

ARMSTED MAINS

v.

JOSEPH COSNER.

1. **SEDUCTION—evidence—promise to marry.** In an action by a father for the seduction of his daughter, the admission of testimony that defendant had promised to marry the daughter, when the jury are instructed not to consider the promise of marriage in aggravation of damages is not erroneous but proper.

2. **SAME—evidence for defendant.** In such action, the defendant offered to prove that his parents were opposed to his keeping company with plaintiff's daughter on account of his youth and indiscretion, and that plaintiff had been notified of such fact, not directly from defendant's parents, which the court refused to admit: *Held*, that the court decided correctly.

3. **SAME.** If the offer had been to prove that plaintiff had been warned against the defendant on account of his bad habits, or profligate character, the evidence would have been admissible. But knowledge of the plaintiff that defendant's parents were opposed to his keeping the company of the daughter on the mere ground of youth and indiscretion would not indicate that a seduction was apprehended.

4. **VERDICT—setting aside—irregularity.** The court, when about to adjourn for the day, in the absence of defendant's counsel, directed the sheriff to allow the jury upon agreement to seal up their verdict and disperse, with instruction to meet the court in the morning, which was done. In the morning the jury met the court and delivered their verdict, the defendant's counsel being present. The court refused to set aside the verdict for the cause stated: *Held*, that, as it did not appear that defendant was in any manner prejudiced, the irregularity was no ground for setting aside the verdict.

5. **ERROR IN FACT—infant's appearance by attorney.** The defendant in a suit at law appeared by attorney, and on the trial it appeared incidentally that the defendant was an infant. The question of infancy was not raised in the court below. On error, it was objected, for the first time, that the appear

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ance should have been by guardian : *Held*, that a motion should have been made in the circuit court to set aside the verdict and judgment on that ground, as an error of fact, when evidence could have been heard on both sides, and the decision of the court thereon might then be reviewed.

WRIT OF ERROR to the Circuit Court of Cass County ; the Hon. CHARLES TURNER, Judge, presiding.

Mr. I. J. KETCHAM, and Messrs. POLLARD & PHILLIPS, for the plaintiff in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

We find no grounds in this record for reversing the judgment. The admission of testimony that the defendant had promised marriage was in conformity with nearly all the authorities. The evidence was admissible, because tending to show that the defendant sought the society of plaintiff's daughter under the pretense of honorable motives, and that the illicit intercourse was, therefore, the result of seduction on his part in the strict sense of the term. The court properly instructed the jury that they were not to consider the promise of marriage in aggravation of damages in this action. The evidence taken in connection with this instruction was not improper.

It is objected that the court erred in not permitting defendant to prove that the parents of defendant were opposed to his "keeping company" with plaintiff's daughter, because "of his youth and indiscretion," and that the plaintiff was notified of their objections. If the offer had been to prove that the plaintiff had been warned against the defendant on account of his bad habits or profligate character, the evidence would have been admissible. But the proposed proof was not of that nature, and the defendant did not offer to show that his parents had directly stated to the plaintiff that they were opposed to any intercourse between their son and his

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daughter, but only that he had been in some way notified that such was the fact. If the parents of the defendant had desired to put the plaintiff on his guard against their son, they should have done so directly and in plain terms. One of plaintiff's daughters had married a brother of defendant, and this circumstance would naturally lead to unreserved intercourse between the members of the two families. If the defendant's parents feared the consequences that have resulted, they should have cautioned the plaintiff, and should have placed their objections to the intercourse on the true grounds. Mere opposition to the intercourse, on the ground of "the youth and indiscretion" of their son, even if this opposition were known to plaintiff, would not indicate to the latter that they feared their son would seduce his daughter, or that such a result was to be apprehended.

The record shows that the court, when about to adjourn for the day, directed the sheriff, in the absence of defendant's attorney, to allow the jury, if they should agree upon a verdict, to seal it and disperse, and meet the court in the morning to deliver it. This was done. We do not consider this a sufficient ground for reversing the judgment. The jury met the court in the morning, and the counsel for defendant were present, and had an opportunity of polling them when the verdict was delivered. It is not claimed that the defendant was, in fact, prejudiced by the irregularity, and unless he was so, it is not a sufficient ground for setting aside the verdict. *Smith v. Thompson*, 1 Cowen, 221; *Wharton v. Wharton*, 2 id. 589.

It is objected that the defendant was an infant when the suit was brought, and appeared by attorney instead of guardian. This question was not in any manner raised in the court below, and there was, therefore, no adjudication upon it. The fact of infancy, if it was a fact, appeared only incidentally on the examination of one of the witnesses. A motion should have been made to set aside the verdict and judgment. On that motion the court would have heard the evidence on both sides, and its decision could then have been re-examined

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here. As now presented, the alleged error is merely an error of fact. The case, in this respect, is like that of *Beaubien v. Hamilton*, 3 Scam. 215.

The judgment must be affirmed,

Judgment affirmed.

INDIANAPOLIS & ST. LOUIS R. R. Co.

v.

LUTHER MILLER.

1. *ERROR—presumption.* Unless the contrary is shown, it will be presumed on error, in a suit at law, that the court below decided correctly.

2. *SAME—admissibility of evidence.* Where it is assigned for error that the court below refused to admit or hear testimony, its relevancy should be made to appear by bill of exceptions, otherwise this court will presume in favor of the ruling below, that such evidence was not pertinent to the issues.

3. *MATTOON COM. PLEAS COURT—trial of appeal from.* The act creating this court gave an appeal to the circuit court of Coles County, in the same cases, to be taken and conducted in the same manner, as appeals from the circuit to the supreme court, with this proviso, "provided, either party may introduce other and additional evidence upon the trial in the circuit court as in other cases." It was held that a party appealing under this act from a judgment against him, and failing to preserve the evidence heard on the trial in the common pleas court, could not be allowed to introduce evidence on the trial of the appeal.

4. *SAME—construction.* The manifest intention of such act is, that if the objection is to the finding of the jury, the evidence should be preserved in and made a part of the record by a bill of exceptions, and that the case should be tried in the circuit court on the bill of exceptions, and such additional evidence as the parties may introduce. When the evidence is not thus preserved there can be no trial in the evidence heard below, and there is no evidence in the record to which other evidence can be added.

5. *SAME.* When the evidence is not preserved in the record, the circuit court must try the case on the record alone, and if no error appears therein, the circuit court may either affirm the judgment below and award a *procedendo*, or render final judgment and award an execution the same as this court may do.

62	468
121	259
62	468
125	260

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WRIT OF ERROR to the Circuit Court of Coles County ;
the Hon. JAMES STEELE, Judge, presiding.

Mr. JAMES W. CRAIG, for the plaintiff in error.

Messrs. BENNETT, HENRY & HUGHES, for the defendant
in error.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was an action of trover, instituted by defendant in error in the common pleas court of Mattoon, against plaintiff in error, to recover the value of certain railroad tools and implements, claimed to have been owned by defendant in error, and converted by the railroad company to its use. There was a trial, resulting in a verdict and judgment in favor of plaintiff in the common pleas court, from which the company appealed to the circuit court of Coles County. Errors were assigned on the record that the verdict was against the evidence, etc.

At the April term, 1871, of the circuit court, defendant in error moved the court to dismiss the appeal on several grounds, but the company having filed an amended appeal bond, under a rule of court, the motion was overruled. A trial was then had by the court by consent, without a jury, and the judgment of the common pleas court was affirmed, and a writ of error is prosecuted to this court. Defendant in error read in evidence the transcript of the record of the common pleas court, but introduced no other evidence. The company offered to introduce, as the record stated, " Other and additional evidence from that introduced by them on the trial below ; " but the court refused to hear it on being objected to by defendant in error. And the error assigned on this record questions the correctness of that decision.

In the first place, there is no bill of exceptions appearing in this record, from which we can determine whether the evidence had the slightest relevancy to the case. It may have

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been ; and the presumption, in the absence of a bill of exceptions, is, that it was not pertinent to the issue. Until the contrary is shown, the presumption is that the court below decided correctly ; and we have seen that no error has been shown in this instance.

But it is urged that the law creating this common pleas court, (Sess. Laws 1869, § 10, p. 135) prohibited the court below from hearing evidence, inasmuch as there was no bill of exceptions preserving the evidence in the common pleas court. The portion of that section which bears on this question is this :

“Appeals from the orders and judgments of said court may be taken to the circuit court of Coles County, and shall be had in the same cases, and taken and conducted in the same manner as is provided by the laws of this State for the taking of appeals from the circuit court to the supreme court: Provided, that either party may introduce other and additional evidence upon the trial of said cause in the circuit court as in the other cases.”

While it is true that a party may prosecute an appeal from the judgment of the circuit court to the supreme court without filing any bill of exceptions, it is equally true that the appellate court on such appeal can only review the record of the court below, and affirm or reverse, as it may or not find error in the decisions of the court below. But when there is no bill of exceptions, the supreme court can not review evidence or other matter which can only become a part of the record by a bill of exceptions. In the supreme court no evidence can be heard unless it be embodied in a bill of exceptions ; and when the error assigned is that the verdict is not supported by the evidence, the issues are tried by the evidence in the record, and made a part of it by bill of exceptions. And when the statute declared that appeals might be taken from the orders and judgments of the common pleas court to the circuit court, and conducted in the manner as provided for taking appeals from the circuit to the supreme court, it was

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manifestly intended that if the objection was to the finding of the jury, the evidence should be preserved in and made a part of the record by a regular bill of exceptions, and that the case should be tried in the circuit court on the bill of exceptions, with such additional evidence as the parties might introduce.

But if no bill of exceptions embodying the evidence was made and sent to the circuit court, then there can not be a trial on the evidence because the evidence heard in the court below, is not, nor can it be heard in the circuit court; and there being no evidence in the record sent up, there is not evidence in the court to which other evidence can be added. To hold otherwise would be to give a trial *de novo* in the circuit court, and such a trial is clearly negatived by the language of the statute, when it requires the appeal to be conducted in the same manner that is required in taking appeals to this court, except so far as it is altered by allowing other and different evidence. Had a new trial been ordered the statute would have declared that the trial should be conducted in the same manner as trials in the circuit court, or by some other as clear and unambiguous language. The court below, therefore, did right in rejecting the evidence offered, whether or not it was pertinent to the issue. The only course left to the circuit court was to try the case on the record of the common pleas court; and no error is perceived in it.

In this court there is, under the statute, an undoubted power to affirm the judgment of the court below and to award a *procedendo*, or to render a judgment in this court and award an execution; either course is open to this court. And when the statute requires an appeal from the common pleas court to be taken and conducted in the same manner as in this court, the circuit court may, on the trial of an appeal on the record, and not by a jury, either affirm and award a *procedendo*, or render final judgment and award execution.

Perceiving no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

CASSIUS G. WHITNEY

v.

JOHN ALLEN.

1. **LIBEL—PRIVILEGED COMMUNICATION.** On the trial of an action on the case for libel, the plaintiff offered in evidence a petition to the judge of the circuit court, signed by the defendant and others, charging the plaintiff with gross neglect of his duty as State's attorney of the circuit; with being wilfully and corruptly guilty of oppression in office, and of corrupt malfeasance in office; of taking bribes from parties accused and indicted, and in pursuance of corrupt agreements releasing them from prosecution, and containing many and various specific charges, and concluding by asking the judge to suspend the plaintiff from the discharge of the duties of his office until the grand jury could investigate the charges. The circuit court on objection refused to admit the same as evidence, on the ground that it was a privileged communication: *Held*, that the court erred in refusing to admit the same. It should have been admitted, and then the question would be whether it was presented in good faith for the purpose of having a State's attorney *pro tem* appointed to prepare and prosecute an indictment against the plaintiff, or prepared for a bad purpose and from malicious motives.

APPEAL from the Circuit Court of Fulton County; the Hon. C. L. HIGBEE, Judge, presiding.

Messrs. SHOPE, FULLERTON, GREEN & FOSTER, for the appellant.

Messrs. INGERSOLL & McCUNE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

* This was an action on the case for a libel, in, the Mason Circuit Court.

The libellous paper, so called, is set out in the declaration, and appears to be a petition, signed by the defendant, addressed to the judge of the 21st judicial circuit, of which Mason County is a part, charging appellant with gross neglect of his duty as State's attorney of that circuit; with being wilfully and corruptly guilty of oppression in office, and of corrupt malfeas-

Opinion of the Court.

ance in office; of taking bribes from parties accused and indicted, and in pursuance of corrupt agreements releasing them from prosecution, and containing many and various specifications.

On the trial of the cause, on a change of venue to Fulton County, the plaintiff proposed to read in evidence to the jury the original petition. On objection by the defendant, the court refused to permit the petition to be read in evidence. To this ruling an exception was taken. The jury found for the defendant, and the court rendered a judgment on the verdict.

To reverse this judgment the record is brought here by appeal, and the only error assigned is the refusal of the court to admit, as evidence, the original petition on which the libel was predicated. The ground for rejecting it being, as we understand, that it was a privileged communication, which can not be the foundation of a libel.

Admitting, for this occasion, the doctrine contended for, as to privileged communications, it is sufficient to say, the petition does not on its face purport to be in a judicial proceeding. We think it should have been admitted, and then the question would properly have arisen, whether it was presented to the court for the purpose, and in good faith, of having a State's attorney *pro tem* appointed to prepare and prosecute an indictment against the plaintiff, in pursuance of section 110 of the criminal code, R. S. 1845, p. 170.

This the plaintiff might contradict, and show it was prepared for a bad purpose, and from malicious motives.

For the error in excluding the petition the judgment is reversed and the cause remanded that a *venire facias de novo* may be awarded.

Judgment reversed.

Syllabus. Statement of the case.

62 474
58a 102

EBENEZER NOYES

v.

EDWARD McLAFLIN.

1. **VARIANCE.** A declaration upon an arbitration bond, which was executed by a party to the arbitration and his security, stated that the said plaintiff and the said defendants, described in said bond and the condition thereof, entered into an agreement to arbitrate. The condition of the bond recited that the plaintiff and only one of the defendants sued had entered into the agreement: *Held*, that an objection to the bond on the ground of variance was properly overruled.

2. **SAME.** Where the words plaintiff or defendant are used in the plural or singular number, they will be regarded as being used in the number which the context shows was intended.

3. **AWARD—construction as to interest.** Where an award found a certain sum to be due from one of the parties to the other, and directed its payment as follows: "One thousand dollars to be paid within five days from this date, and the balance (twelve hundred and eighty-four dollars and thirty-two cents) to be paid within sixty days from this date, together with ten per cent interest per annum thereon from this date until paid:" *Held*, that no interest was to be paid on the one thousand dollars, if paid within five days; and that, as the award made no provision for any rate of interest if not so paid, the rate of interest must be governed by the statute, and that no higher rate than six per cent per annum could properly be allowed.

4. **SAME—interest.** Where an arbitrator is empowered to make an award according to the principles of justice, and the award gives sixty days' time for the payment of the principal sum found to be due, it will not be considered as unreasonable, if it also requires the party to pay interest on such sum from the date of the award at the rate of ten per cent per annum. The terms of such a submission are broad enough to authorize such an award.

WRIT OF ERROR to the Circuit Court of Coles County;
the Hon. A. J. GALLAGHER, Judge, presiding.

This was an action of debt upon an arbitration bond executed by E. Noyes, principal, and Hiram Cox, his security, to E. McLafin. The bond recited that, whereas, the said E. Noyes and E. McLafin have entered into an agreement to arbitrate, etc. The declaration in reference to this part of

Statement of the case. Opinion of the Court.

the bond alleged that the said plaintiff and the said defendants, described in said bond and the condition thereunder written, entered into an agreement to arbitrate. On the trial the bond was objected to on the ground of variance, but the court overruled the objection. The sole arbitrator, among other things, awarded as follows:

"7th. I find that there is due from said Noyes to said McLaffin the sum of two thousand two hundred and eighty-four dollars and thirty-two cents (\$2,284.32), and I award and direct that the said Noyes pay to the said McLaffin the said sum of two thousand two hundred and eighty-four dollars and thirty-two cents; one thousand dollars to be paid within five days from this date, and the balance (\$1,284.32) to be paid within sixty days from this date, together with ten per cent interest per annum thereon from this date until paid."

Messrs. HENRY, REED & HUGHES, for the plaintiff in error.

Messrs. BROWN & EPLER, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of debt, brought by the defendant in error on an arbitration bond against the plaintiff in error and Hiram Cox, his security on the bond.

In the declaration the bond is declared on according to its legal effect, and then the condition thereunder written is set out *in hæc verba*, together with the original and supplemental agreements between the parties to submit all matters in dispute between them to the arbitrament of James A. Eads. So much of the award made by the arbitrator as shows that a money award was made in favor of the defendant in error is set out in the declaration, and the breaches assigned are, that the plaintiff in error did not pay the several sums of money which he was directed by the terms of the award to pay to the defendant in error.

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On the trial numerous objections were taken to the admission of the written evidence, all of which are of the most technical character. This court has repeatedly held that where the words plaintiff or defendant are used in the plural or singular number, we will regard them as being used in the number which the context shows was intended to be used. *Hofferbert v. Klinkhardt*, 58 Ill. 450.

In the light of this reasonable rule, the objections to the admission of the bond and submission in evidence are untenable, and were properly overruled.

It is insisted that the arbitrator had no power, under the agreement between the parties, to award that the plaintiff in error should pay interest at the rate of ten per cent per annum on the sum of money which, by the terms of the award, was not to be paid until after the expiration of sixty days.

The arbitrator was empowered to make the "award in the premises on the principles of justice," and no reason is perceived why he could not, under this equitable power to do complete justice between the parties, provide that the plaintiff in error should pay interest on the deferred payment. It seems to us that the terms used in the submission are broad and comprehensive enough to authorize the arbitrator to make the award. The money was found to be due to the defendant in error, and, upon every principle of justice, if the plaintiff in error was given time in which to pay the amount so found to be due, he ought to be required to pay the usual and customary rate of interest. It was doubtless adjudged by the arbitrator to be equitable to allow time in which the plaintiff in error should be required to pay the amount found due, and upon the same principle, and upon the same authority, he ought to be required to pay interest on the deferred payment for the favor awarded.

The rate of interest was not fixed under the statute, and the rate fixed by the arbitrator is the usual rate for money loaned, and is not unreasonable in this case.

We think that the court erred in computing interest on the one thousand dollars, which, by the terms of the award,

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was to be paid within five days, at a higher rate of interest than six per cent per annum.

The only construction that can reasonably be given to the award is, that no interest was to be paid on the one thousand dollars if it should be paid within the five days, and the award makes no provision for any rate of interest in case it was not paid within that period. Hence, the rate of interest must be governed by the statute; and we are of opinion that, under the statute, no higher rate of interest than six per cent per annum could properly be allowed.

For the error indicated the judgment is reversed and the cause remanded.

Judgment reversed.

SAMUEL E. HATCHER

v.

THE TOLEDO, WABASH & WESTERN RAILROAD COMPANY.

1. *STATUTE—construction—retrospective.* The intention must be clearly expressed that a statute should retroact upon prior contracts and rights, before this court will so construe it. If the intention be doubtful, the construction will be that it operates prospectively only.

2. *SAME—consolidating railroads.* The act of 1867, which provides that, in case of consolidation of two or more railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but was designed to apply to companies which might consolidate after its passage.

3. *CONSOLIDATION OF RAILROADS—liability for debts by subsequent legislation.* A railroad company being authorized by its charter to borrow money and secure its payment by mortgage or deed of trust of its road, property, and income, but not of its franchise, executed a deed of trust on its road, property, rights, and franchise, under which the trustees sold and conveyed the same to certain parties, who organized a new company under the old name. Subsequently, a special act of the legislature was passed authorizing the president of the old company to transfer the corporate franchise to the purchasers, which he did, and the old corporation ceased to exist: *Held*, that

Syllabus. Opinion of the Court.

the purchasers at the trustee's sale having acquired a valid title to the property of the corporation without liability for any of its debts which were not a prior lien, their rights could not be taken away or impaired by subsequent legislation; and having consolidated with another company prior to the act of 1867, the consolidated company was not liable for the debts of the first-named corporation.

4. **CURATIVE LEGISLATION.** Where a railroad company has made a mortgage or sale of its corporate franchise, without authority in its charter, the same may be ratified and rendered valid by subsequent legislative enactment. The right to object to such transfer is one affecting the public alone, which the legislature, as the representatives of the people, may waive by a subsequent act.

5. **SAME.** Thus a railroad company, not authorized to incumber or transfer its corporate franchise, executed a deed of trust on its road, property, rights, and franchise, under which the trustee sold and conveyed the same. The president of the company, under a subsequent act for that purpose, transferred the corporate franchise to the purchasers: *Held*, that even if the franchise could not be transferred without the consent of the legislature, it might be subsequently given; and that the State having assented to the sale of the franchise, no other party could interfere.

6. **SALE OF FRANCHISE FOR DEBT.** It seems that without legislative authority, the franchise of a railroad company can not be subjected to sale on judgment and execution for its debts.

APPEAL from the Circuit Court of Adams County; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an action of debt, brought by appellant against appellee, to recover on coupons of bonds issued by the Quincy & Toledo Railroad Company. The facts bearing upon the questions decided appear in the opinion of the court.

Mr. JACKSON GRIMSHAW, for the appellant.

Messrs. SKINNER & MARSH, for the appellee.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The indebtedness sued upon was created by the Quincy & Toledo Railroad Company; and recovery is sought upon the

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ground of the consolidation of the two companies, by virtue of the statute, which provides, that in case of consolidation of two or more companies, the consolidated company shall be liable for all debts of each company which may enter into the arrangement. Sess. Laws 1867, 80.

The company which created the indebtedness prior to the alleged consolidation, executed a deed of trust, with power of sale, upon the road, and all the property, rights, and franchises of the company, to John Ross, as trustee, to secure a large indebtedness.

The trustee sold, under the trust deed, to Morgan, Ketchum, and Jesup, and executed to them a deed in 1861. The consolidation was not effected until in 1865. Intermediate the date of the deed and the consolidation, the purchasers at the trustee's sale, organized a corporation by the name of the "Quincy & Toledo Railroad Company;" fixed the amount of capital stock; provided for an annual meeting of stockholders; designated certain persons as directors until the annual election, with power to manage the affairs of the company; issued certificates of stock, and provided a corporate seal.

The original charter of the company authorized it to borrow money; execute bonds therefor; and secure their payment by a mortgage or deed of trust upon the road, property, and income of the company; but did not authorize it to mortgage its franchise.

Subsequent, however, to the execution of the trust deed, and prior to the sale thereunder, the legislature authorized the president of the company, by writing, under the corporate seal, to transfer the corporate franchise to the purchasers under the deed of trust. Pri. Laws 1861, 520.

A deed was executed in pursuance of this law, and accepted by the purchasers, and the organization by them before referred to, effected.

The law of 1861 authorized the purchasers, after the acceptance of the deed, to assume and use the corporate name of the Quincy & Toledo Railroad Company, with all its privileges and franchises.

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The proof shows, further, that after the sale the general manager of the road, who never had any connection with the old company, operated it for the purchasers, and that the old company ceased to exist so far as the old officers had any thing to do with the management.

Under the facts, there are numerous objections to recovery in an action of debt, by virtue of the law of 1867, passed two years subsequent to the consolidation.

This law is not retrospective in terms, and can not be made so by any fair construction. Its language and object are entirely prospective; and the intention must be clearly expressed, that it should retroact upon prior contracts and rights before the court will so construe it. If the intention be doubtful, the construction will be, that it is to operate prospectively only. It is manifest that this act was designed to apply to companies which might effect a consolidation after its passage. *Garrett v. Wiggins*, 1 Scam. 335; *Thompson v. Alexander*, 11 Ill. 54; *Marsh v. Chesnut*, 14 Ill. 223.

In the last case the court declared it to be a serious question, whether the legislature had the constitutional power to enact retroactive laws.

The company had the unquestioned right to mortgage its road and property to secure money borrowed, without any regard to the franchise; upon default in payment, the trustee had the right to sell, and the purchasers at the sale acquired a good and valid title to the property, without any liability for other debts of the company than those secured by the mortgage. The road and property had been legally transferred to the purchasers, even if the stockholders owned the corporate franchise; and the latter was of very little benefit to them without the road and its equipments.

The purchasers then had obtained rights which could not be taken away or impaired by subsequent legislation; and to give to this act a retroactive effect would create a new obligation, and impose a new duty, which did not exist under the laws in force at the time of the purchase.

It is unnecessary to determine whether the sale and convey-

Opinion of the Court.

ance, under the mortgage, had the effect to transfer the franchise, though respectable courts have held that such would be the operation. It has been decided that the power to mortgage presupposed the power to transfer the beneficial use of the franchise; and that where the power was given to mortgage the property of the company, to secure the payment of loans, and a sale was made and a deed executed in pursuance of the power, assigning the road and effects, that this operated as a complete transfer of the franchises of the corporation. *Allen v. Montgomery Railway*, 11 Ala. 437; *Mobile & Cedar Point Railway v. Talman*, 15 Ala. 472; *Pollard v. Muddox*, 28 Ala. 321.

In *Bowman v. Wathan*, 2 McLean, 393, it was held that a ferry franchise was assignable, and that no difference could be perceived between a ferry and a railroad franchise.

In the case at bar, the road and all the property of the company were transferred to the purchasers under the trust deed, and were thereby released from any liability for the payment of debts which were not a prior lien. The future earnings were likewise released.

Even though the franchise remained in the original corporation, it could not be sold except by the authority of the legislature. Hence, neither the property, nor earnings of the road, nor the franchise, can be sold for the satisfaction of the debts due to the plaintiff below. *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353.

But what was the effect upon the corporate franchise, of the act of 1861, and the deed made under the power therein contained?

While it may be true that the franchise could not be mortgaged or transferred without the consent of the legislature, what is the objection to this assent being given subsequent to the original grant? The franchise is a privilege granted by the sovereign; and the right to mortgage and assign it might have been given in the original charter. This may as well be done by a subsequent act, passed as this act was, before the sale. It was the assent of the sovereign essential to the transfer of the franchise, and necessary to enable the company

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to fulfill its honest engagements; and this power of conveyance was a matter between the State and corporation. Third persons had nothing to do with it. *American Colonization Society v. Wade*, 7 S. & M. 663; *Arthur v. Com. Bank of Vicksburg*, 9 S. & M. 394.

Mr. Redfield, in his work on Railways (2 Vol. 516, note), says it is the settled doctrine in the English law that railway corporations may apply to the legislature for enlarged powers.

Railway companies are constantly applying to the legislature for an enlargement of their powers; and we must presume that the act in question was obtained by and for the benefit of the company. We regard the act of 1861 not only as a recognition of the sale, but as giving the consent of the State to the transfer of the franchise.

Even mortgages of corporate franchises have been held to have been confirmed by subsequent ratifications by the legislature. 2 Red. Railways, 517, note.

In *Shaw v. Norfolk County R. R. Co.*, 5 Gray, 162, it was insisted that a franchise, created by the legislature and conferred upon a particular party, could not lawfully be sold and transferred to another; and the court decided that the conveyance was good, as it was ratified and confirmed by a subsequent enactment.

The right to object to the transfer of the franchise, and its exercise by a party to whom it was not originally granted, was a right affecting the public, which the legislature, as the representative of the public interests, might waive by a subsequent enactment. *Richards v. Merrimack & Conn. R. R.*, 44 N. H. 127.

The State, by the act of 1861, assented to the sale of the franchise, and no other party can interfere.

The judgment is affirmed.

Judgment affirmed.

MARSTON HEFNER

v.

DAVID VANDOLAH.

82	483
164	329

1. *PROMISSORY NOTE—ratification of forged signatures.* One whose name has been attached to a note as surety, without authority becomes liable, if, upon inspection, he admit the signature to be his. After such admission he is estopped from denying the making of the note.

2. *PREVIOUS AGENCY—not necessary.* Nor is it necessary, to establish a ratification, that there had been any previous agency created. An act wholly unauthorized may be made valid by a subsequent ratification.

3. *ADMISSION—when not conclusive.* A person who has signed several notes of like character, and, who under a mistake admits the signature of one, especially if not shown him, is not estopped from his plea denying his signature.

4. *USURY—will vitiate judgment.* A judgment founded upon a note which upon its face reserves an usurious rate of interest should be for the principal alone.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WILLIAMS & BURR, for the appellant.

Messrs. WELDON & BENJAMIN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee against appellant, upon a promissory note purporting to have been made by appellant and one Coman.

Appellant by plea, verified by affidavit, denied the making of the note, and it is not claimed that he did make it, but it is insisted that by certain declarations made by him, he is estopped from denying the making of the note.

The note sued on is as follows:

\$700.

Sept. 25, 1869.

Six months after date, we promise to pay to the order of

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David Vandolah, seven hundred dollars, at twelve per cent interest, for value received.

W. COMAN.

MARSTON HEFNER.

The cause was tried by the court, without the intervention of a jury, the issue found for the plaintiff and his damages assessed at the sum of seven hundred and ninety dollars and seventy-three cents, for which, after overruling a motion for a new trial, judgment was rendered against the defendant, from which he prosecutes this appeal.

The only questions raised are, as to the sufficiency of the admissions and declarations of Hefner to render him liable upon the note, and as to the correctness of a judgment for the principal and interest of the note bearing, as it does, upon its face, the usurious rate of interest of twelve per cent.

The argument of appellant's counsel proceeds entirely upon the ground, that the acts and admissions of Hefner, in order to charge him with liability upon this note which he never executed, must be of such a character as to constitute an estoppel *in pais*, having the element of actual damage from delay occasioned by the acts of Hefner misleading Vandolah; and that the evidence comes short of making such a case. Without considering whether there may not be enough to support the judgment on that ground, we apprehend nothing more is necessary to be shown here, than that Hefner adopted and ratified his forged signature upon the note, to render him liable thereon.

It was in evidence, that soon after the time the note bears date, Vandolah showed it to Hefner, intimating a doubt as to its genuineness, and expressing a wish to know in regard to it; that Hefner examined the note expressing nothing definite, but intimating that the signature might be his, and saying he would let Vandolah know in a few days; after the lapse of a few days, Hefner told Vandolah that he had signed the note. There was abundant evidence to justify the court in finding

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that Hefner unequivocally and understandingly adopted and ratified the use of his name on this note.

If there had been an original assent on the part of the defendant to the placing of the signature of his name upon the note by Coman, the principal promisor, there can be no question that he would have been bound by it.

The subsequent assent of Hefner to, and ratification of the unauthorized use of his name on the note by Coman, must, as we conceive, have the same effect to charge the former, as if he had originally authorized the signature of his name to the note by Coman. Such subsequent assent and ratification would be equivalent to an original authority, and confirm what was originally an unauthorized and illegal act. Story on Agency, Sections 239, 253.

We conceive that the same rule should apply here as in the case of the adoption or ratification of an ordinary act of assumed agency; that the form of signature not bearing any indication of the fact of its being made by another hand, does not prevent the person whose name is placed on the note from being legally holden; upon proof that the signature was previously authorized, or subsequently adopted. Nor is it necessary, to establish a ratification, that there had been any previous agency created. An act wholly unauthorized may be made valid by a subsequent ratification. *Culver v. Ashley*, 19 Pick. 301.

As fully sustaining the views here expressed, we refer to the following authorities: *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577; *Greenfield Bank v. Crafts et al.* 4 Allen, 447; *Casco Bank v. Keene*, 53 Maine 103; *Livingston v. Wiler*, 32 Ill. 387.

This does not present the case of admissions, under a mistaken belief, that the signature was genuine. In this respect, a marked difference exists between the present case and that of *Hefner v. James Vandolah*, 57 Ill. 520. In that case Hefner had not seen the note, and as he had signed several notes as surety for Coman, he might well have supposed that the note which Vandolah mentioned to him as having, not

Opinion of the Court. Syllabus.

stating its amount, was one which he had signed; and all his supposed acts of adoption and ratification might well have proceeded upon that false assumption. In the present case, the acts and admissions of the defendant were, after a careful actual examination of the note, and time taken for consideration, with full knowledge that the signature was not in his handwriting.

As the note upon its face bore a greater rate of interest than ten per cent, the whole of the interest was forfeited under the statute, and only the principal sum due was recoverable.

For error in this respect, in rendering judgment for interest upon the note, the judgment must be reversed and the cause remanded.

Judgment reversed.

H. G. FITZHUGH *et al.*

v.

JOHN T. SMITH.

1. SPECIFIC PERFORMANCE—*who may maintain bill for.* Where the title of a vendee of land is sold under a valid decree against him, the purchaser, upon receiving a master's deed therefor, succeeds to his position as vendee; and, upon complying with the terms of sale, may maintain a bill against the vendor for specific performance.

2. SAME—*what relief, decree.* S sold a lot to H for seven hundred and fifty dollars, on credit, giving a contract for a deed, which was never recorded, reserving the right to declare a forfeiture for non-payment, and making time of the essence. The vendee afterward loaned H three hundred dollars, secured by an assignment of the contract, to enable the latter to erect a building upon the lot, in the progress of which H incurred an indebtedness to F and B for materials. They, uniting with other lien holders, filed a petition to establish a lien on the premises, making the vendor and vendee defendants, alleging in the petition that H held the premises under a contract of purchase from S. The latter suffered the petition to be taken as confessed, and a decree and sale followed of the interest of H in the premises; F and B became the purchasers, and received the master's deed.

Syllabus.

After receiving their deed, they tendered to S eight hundred and eighty-five dollars, and demanded a deed; and, upon his refusal, filed their bill for specific performance. The defendant filed no cross bill, asking for affirmative relief. The circuit court, on the hearing, refused to decree that S should execute a deed to complainants upon their payment of the amount of the purchase money found to be due, with interest, but ordered the premises to be sold, and payment out of the proceeds to be made: first, the amount of the purchase money and interest due to S; secondly, the amount of the original lien of F and B; thirdly, to S the amount of his loan to H, and interest; and, finally, to F and B the amount due the other lien holders, which they had paid at their purchase: *Held*, that the decree was erroneous; that no sale should have been ordered; that the complainants having succeeded to the rights of the original vendee, was not entitled to such relief, and that the vendor was not entitled to any affirmative relief; that the complainants were not bound to pay S the sum loaned by him to H; that the proper decree was to require the complainants to pay the amount due upon the contract of sale, with interest, in specie, the contract providing for its payment in gold or its equivalent, within thirty days after entering the decree, and that the master in chancery pay the same over to S upon his executing a proper deed.

3. *SAME*. A vendor of real estate, whose purchase money is due and unpaid, may file a bill asking a sale of the premises in default of payment, and thus discharge himself of the equities of the vendee; but the vendee has no right to a decree of sale against the vendor for the purpose of paying the unpaid purchase money.

4. *SAME—tender*. Where the complainants in a bill for specific performance have succeeded to the rights of the original vendee, by purchase at a judicial sale, and the vendee's contract of purchase has not been recorded so as to give notice of its terms, it will not be necessary for the complainants, before filing their bill, to make a formal tender of the precise sum due the vendor. It will be sufficient if they offer to perform the contract when the vendor declines to recognize their right to a deed unless they pay him money which he had loaned the vendee.

5. *EQUITABLE MORTGAGE*. Where the vendor of land, after the sale, loans the vendee money, taking back an assignment of the contract to secure its repayment, with an agreement that it shall be forfeited if the money is not repaid when due, the transaction will be regarded as an equitable mortgage.

6. *SAME—lost by laches*. Where the holder of such mortgage, who is also vendor, is made a party defendant in a petition by creditors of the vendee seeking to establish a lien against the premises embraced in the contract as against the vendee, the petition alleging that the vendee holds the land under a contract of purchase from the vendor, and he fails to answer and disclose his rights as such mortgagee, but suffers such creditors to take a de-

Syllabus. Opinion of the Court.

cree for the sale of the vendee's interest, and become purchasers at the sale without notice of his secret lien; the purchasers will succeed to the interest of the vendee, under the original contract of purchase, fully discharged from the lien of the equitable mortgage.

7. *DECREE—how far conclusive.* Where a petition to enforce a lien for materials furnished in the erection of a building is filed against the vendee and vendor of land, which alleges that the former holds the premises under a contract of purchase from the latter, and the vendor fails to answer, and a decree is taken and the land sold to the petitioners, this will not prejudice the vendor's right to require payment of the purchase money and interest before parting with the title. But if he has any other claim upon the land, such as an equitable mortgage or secret lien, and fails to disclose it before decree and sale, the purchaser of the land without notice, will take the land discharged of such secret claim or interest.

8. *FORFEITURE—vendor and vendee.* A right of forfeiture, although tolerated, is not favored in courts of equity. Where the party seeking to enforce such right, by his conduct has misled others, and suffered them to acquire rights in ignorance of his right to declare a forfeiture when called upon to disclose the true state of the facts, a court of equity will not allow him to exact a forfeiture.

9. *SAME—waiver.* Thus, where a vendor had, in his contract for the sale of land, reserved the right to declare a forfeiture for non-compliance with its terms, and the contract was not recorded so as to afford notice of its terms, and when made a party defendant in a judicial proceeding against his vendee to establish and enforce a lien, and subject the interest of the vendee to sale, and failed to answer and disclose the terms of the contract and his right to insist on a forfeiture, or even to give notice thereof, but suffered the creditors to proceed to decree, and to advertise the sale of the premises, and then notified them of his intention to declare a forfeiture only three days before the sale, it was held that by his conduct he had waived his right to declare a forfeiture as against the rights of such creditors.

10. *SPECIE CONTRACT.* Where, by the terms of a contract for the sale of land, the purchase money is made payable, with interest, in specie funds, on bill for specific performance against the vendor, the decree, if for the complainants, must require them to pay in specie the sum due on the contract.

WRIT OF ERROR to the Circuit Court of Sangamon County;
the Hon. JOHN A. McCLEARNAND, Judge, presiding.

Smith, the defendant in error, on May 28, 1868, sold a lot in Springfield to Hassan for seven hundred and fifty dollars, payable, one hundred dollars on May 28, 1870, one hundred

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dollars on May 28, 1871, one hundred dollars on May 28, 1872, and four hundred and fifty dollars on May 28, 1878, with interest annually at ten per cent, payable in specie funds. Time was made of the essence of the contract. The contract provided, that in case of failure of Hassan, his heirs, or assigns in the performance of all or either of the covenants or promises on the part of Hassan to be performed, Smith should have the right to declare the contract void without notice.

Messrs. J. C. & C. L. CONKLING, for the plaintiffs in error.

Messrs. STUART & BROWN, for the defendant in error.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court :

On the 28th of May, 1868, Smith, the defendant in error, sold to one Hassan a lot in the city of Springfield for seven hundred and fifty dollars, the first payment falling due in May, 1870, and the last in May, 1878, the interest on the whole sum payable annually. The contract contained a clause of forfeiture. Hassan commenced the erection of a house, and in the progress of the work contracted an indebtedness for materials to Fitzhugh and Bugg, the complainants herein, who, on the 19th of January, 1869, filed a petition to establish a lien, uniting therein with Hopping and Ridgely, who were also lien-holders, and making Hassan and Smith defendants. The petition alleged that Hassan held the premises under a contract of purchase from Smith. Smith was summoned, but made default. On the 1st of June, 1869, the court rendered a decree directing the sale of Hassan's interest in the land for the amount found due the petitioners. A sale was held at which Fitzhugh and Bugg purchased the premises for the amount due to them and to their co-petitioners, and on the 23d of December, 1869, the day of sale, the master in chancery executed to them a deed. On the 8th of March, 1870, they

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tendered to Smith eight hundred and eighty-five dollars as the amount due to him from Hassan, and demanded a deed. He declined to accept the money, and they thereupon filed this bill to compel him to execute a deed.

The circuit court, on the final hearing, did not decree a deed upon the payment of the amount which it found to be due to Smith, but determined the amount and priority of the respective liens, and decreed the sale of the lot for their payment. It ordered the original purchase money and interest to be first paid to Smith, secondly, the amount of their original lien to Fitzhugh and Bugg, then to Smith the amount of a loan made by him to Hassan to secure which he held an assignment of the contract; and, finally, to Fitzhugh and Bugg the amount due under the lien of Hopping and Ridgely which Fitzhugh and Bugg had paid when they bought at the master's sale.

The complainants bring the record here, and insist that the circuit court should either have granted them the relief they asked, or should have dismissed their bill without ordering a sale of the premises.

We are of the opinion that a decree of sale should not have been pronounced on the pleadings as they stand. The complainants were not entitled to such a decree, and their bill was not framed for the purpose of procuring it. A vendor of real estate, whose purchase money is due and unpaid, may file a bill asking a sale of the premises in default of payment, and thus discharge himself from the equities of the vendee; but we know of no principle upon which a vendee can file a bill and obtain a decree of sale against the vendor for the purpose of paying the unpaid purchase money. Here the complainants occupied the position of vendees. They were not entitled to a decree of sale, and did not ask it, and the defendant Smith had filed no cross bill, and was, therefore, entitled to no affirmative relief.

The error of the court consisted in treating this case as in some way a continuation of the petition for the lien. But the questions arising under that petition were then determined, and these complainants, as the purchasers of Hassan's interest

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under the decree, had succeeded to his position as vendee. This suit, therefore, is to be regarded as one for specific performance, and the only substantial questions to be determined are, whether the complainants have lost their rights by the forfeiture of the contract declared by Smith on the 20th of December, 1869, and if not, what amount Smith is entitled to receive.

The forfeiture declared, was for non-payment of the first annual instalment of interest, and we are of opinion, the right to declare it for that cause had been waived. This interest was due on the 28th of May, 1869. . The decree for the sale of the premises was made on the 1st of June, 1869. Smith was a party to that suit and made default. The contract between him and Hassan was in his custody, and, as appears by the record, was not recorded. The complainants only knew that Hassan claimed under a contract from Smith, but we can not presume they knew all its stipulations. If Smith had answered, disclosing his rights, and setting out the contract, he might have insisted upon his forfeiture if the complainants had neglected to pay the interest when it fell due. But he allowed them to proceed with their suit to a decree, and advertise the sale, and not until the sale was at hand did he notify them of his intention to consider the contract forfeited. A right of forfeiture, although tolerated, is not a favorite in courts of equity, and the mode in which Smith sought to exercise it in this case, can not be permitted. If he did not desire to answer their petition for a lien, he should at least have notified them of the terms of the contract.

It only remains to consider on what basis the amount due Smith should be determined. He claims not only the purchase money due by the contract with Hassan, but also the sum of three hundred dollars loaned by him to Hassan, to assist in building the house, and secured by an assignment of the contract, Hassan agreeing to forfeit it if he did not repay the money by the 1st of January, 1869. Treating this transaction as an equitable mortgage of Hassan's interest in the lot, which it really was, it was clearly the duty of Smith to answer the

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complainant's petition for a lien and set up this claim. They knew nothing of it and had no means of knowing. It was a claim resting on a basis altogether different from the right to payment of the purchase money. An answer was not necessary to preserve that right, as the petition stated that Hassan only had an interest under a contract of purchase, and sought only to affect that interest. The decree provided only for the sale of Hassan's interest, but it was his interest under the original contract, and not as affected by a secret lien. If Smith desired to protect that lien, he should have answered and disclosed it. As to that lien he was in the position of a mortgagee of Hassan's interest, claiming under an unrecorded mortgage; and having failed to set it up in that suit, he can not do it now. When the complainants bought under the decree, Hassan's interest or estate, they bought the estate acquired by him under his original contract, and not as incumbered by an unrecorded lien of which they had no notice. If Smith had set up this lien by answer to their petition, the court could have passed upon it and provided for its satisfaction in its proper order. It is now too late. The purchasers under the decree must be protected from injury through the *laches* of the defendant.

It is not important to determine whether the tender was sufficient or not. It was not necessary, to enable the complainants to maintain this bill, that they should make a formal tender of the precise sum. It was enough that they offered Smith to perform the contract, and that he declined to recognize their right to a deed unless they would pay the money loaned by him, and interest.

Smith, however, was not prejudiced by refusing the tender. By the terms of his contract he was not obliged to accept the purchase money before it fell due, except upon thirty days' notice, and this had not been given.

The proper decree will be that Smith shall convey, if complainants pay to the master the amount due upon the contract within thirty days after entering the decree, with interest reckoned to the expiration of the thirty days, according to the

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terms of the contract; the money to be paid by the master to Smith upon his executing a proper deed.

The contract between Smith and Hassan called for payment in specie. Under the decisions of the supreme court of the United States, the decree will require the complainants to pay in specie the amount due on the contract, in case they elect to acquire the title.

Decree reversed.

ANDREW SMITH

v.

FRANK W. SMITH *et al.*

1. CORPORATION—*acts of officers—presumption.* In the absence of legislative enactment, or provision in their by-laws, corporations act through their president, or those representing him. Where an act pertaining to the business of the company is performed by him, it will be presumed that the act is legally done and binding upon the company.

2. SAME—*vice-president.* As a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead, and perform the duties which devolved upon the president. In this case the charter did not mention a vice-president as an officer of the company, but, after providing for certain officers, it authorized the company to create other officers, and the company, in its by-laws, declared there should be a vice-president, and prescribed his duties: *Held*, that he might perform the duties imposed upon the president in the same cases and under the same circumstances as though his office had been created by the charter.

3. SAME—*deed by vice-president.* Where it appeared, from the minutes of a railroad board of directors, that a resolution was adopted directing the president of the company to sell a tract of land and to execute the necessary deed therefor, under the corporate seal, and the president subsequently elected having refused to act, that the vice-president assumed to discharge the duties of president, and, in strict accordance with the resolution, conveyed the land by deed, under the corporate seal, signing as vice-president and acting president of the company, but the deed was not countersigned by the secretary, as required in the by-laws of the company:

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35a 408
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140 107
40a 354

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159 211
159 241
161 350
49a 188
62 493
60a 186
62 493
164 152

62 493
68a 39
63a 158

62 493
168 317
168 528

62 493
174 236
73a 53

62 493
78a 690
79a 156

62 493
80a 167

62 493
101a 1350

62 493
200 1864

62 493
107a 1846

Syllabus. Opinion of the Court.

Held, that the deed was well executed, and amply sufficient to convey the title of the company.

4. *SAME—deed countersigning.* While it is usual for the secretary of such companies to attest the execution of such instruments, as the keeper of the seal, yet, if the charter of the company does not require such attestation, the deed will be good without it. Strangers dealing with the company are not required to know the provisions of its by-laws, and are not bound by them. They can only be expected to see that such an instrument is executed in the usual form by the head of the company.

5. *SAME—deed.* So, it has been held by this court that a deed executed by the president of a bank, with its seal attached, would be presumed to have been well executed and binding.

6. *JUDGMENT LIEN—notice.* Where a grantee of land had his deed duly recorded before the recovery of a judgment against his grantor, the judgment did not become a lien upon the land, and a purchaser of the same, under execution on such judgment, will acquire no title.

7. *TAX TITLE—evidence to admit deed.* On the trial of an action of ejectment, defendant offered in evidence, as paramount title, a tax deed for the premises, made in pursuance of a sale in 1859 for taxes, but did not offer to prove the steps indispensable to a valid tax sale, and did not produce the judgment and precept: *Held*, that the court did not err in rejecting the deed as evidence.

APPEAL from the Circuit Court of Madison County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The facts appear in the opinion of the Court.

The tax deed offered in evidence was upon sale in 1859.

Messrs. DALE & BURNETT & POEME, for the appellant.

Messrs. METCALF & GILLESPIE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of ejectment, brought by appellees, in the Madison circuit court, against appellant, to recover three eighty-acre tracts of land, situated in that county; the declaration was in the usual form, and to it was filed the plea of not guilty; a trial was had at the May term, 1870, and re-

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sulted in a verdict and judgment in favor of plaintiffs; a new trial was granted under the statute. At the May term, 1871, a trial was had by the court without a jury, by consent of the parties, with a like result; and defendant appeals to this court, and asks a reversal of the judgment of the court below.

Appellees proved a regular chain of title from the general government to the Mississippi & Atlantic Railroad Company, a corporation organized under the general incorporation law of 1849. To prove title in their ancestor, Sanford S. Smith, appellees read in evidence a deed purporting to be a conveyance from the company to him, dated on the 6th day of September, 1855, for the lands described in the declaration. The consideration named in the deed is three thousand four hundred and thirteen dollars and twenty-five cents; and the attesting clause is as follows:

"In witness whereof, the said Mississippi & Atlantic Railroad Company has caused these presents to be signed by their vice-president, acting as president by reason of a vacancy in the presidency, and their corporate seal to be hereto affixed the day and year first above written.

"JOHN BROUGH,

[R. R. SEAL] "*Vice-Pres. and Acting Pres. M. & A. R. R. Co.*"

There is no objection urged against the acknowledgment, but it is insisted that the instrument is not executed by the proper officers of the company, and was for that reason void and of no effect. It is contended that the vice-president of the company had no power to execute the deed, but that the president alone had power conferred upon him for the purpose, and that the by-laws of the company required the secretary, who was the keeper of the seal, to annex it and countersign all deeds for the conveyance of its lands.

From the minutes of the proceedings of the company, it appears that a resolution was adopted at a meeting of the directors of the company, held in the previous month of November, by which the president was directed to sell the property,

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and to execute the necessary deed therefor, under the seal of the company. Brough was, at the time this resolution was adopted, the president of the company; but, at a subsequent election, he was elected vice-president, and one Rose president; but the latter refusing to act, the vice-president assumed the discharge of the duties of president.

In the absence of legislative enactment or provision made in the by-laws, corporations usually act through their president, or those representing him. He being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body. And, as a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead, and perform the duties which devolve upon the president. And such being the case, it must be held that, as Rose refused to act as president of the company, Brough, the vice-president, could not only act as president, but it became his duty to so act in the transaction of the business of the company. Nor does it matter that the act under which the body was organized does not enumerate a vice-president as one of the officers of the company; but, after providing that there shall be a president and other officers named, it authorizes the company to create other officers. And this company, by their by-laws, declared there should be a vice-president, and imposed the duty on him of assisting the president in the performance of such duties as he might require.

In organizing such a body, such an officer is, if not essential, usually created. And this organization, having provided for and elected such an officer, we must hold that he may perform the duties imposed upon the president in the same cases and under the same circumstances that such an officer may act when the office is created by the charter of the company. We see no objection to the deed because it was signed by Brough, as there was no president of the company.

But a question is presented by appellant that the secretary omitted to countersign the deed. He is the keeper of the seal,

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and his attestation usually accompanies the execution of such instruments, and is required by the by-laws of the company. But these are private, and only accessible to the officers of the company. Strangers to the company can not be bound by the rules adopted for the government of the company. The charter did not require the deed to be attested by the secretary, and persons not officers of the company can not be required to know the provisions of their by-laws. They can only be expected to see that such an instrument is executed in the usual form, and by the head of the company. In the case of *Phillips v. Coffee*, 17 Ill. 154, it was held that a deed signed by the president of the bank, with its seal attached, would be presumed to have been well executed, and binding and valid. And the same rule was announced at the present term in the case of *Sawyer v. Cox*, where the question arose as to the sufficiency of a deed executed by a railroad company.

Again, the resolution of the board of directors, adopted on the 9th day of November, 1854, authorized the president to sell this land, "and to execute the necessary deed therefor, under the seal of the company." Here we find clear and explicit authority conferred by the company to convey, and we find the authority strictly pursued to the letter, and we perceive no reason in law or justice why the deed should not be held to be amply sufficient to convey the title of the company. And it appears the deed was recorded on the 10th day of September, 1855, in the proper office.

The judgment under which appellants claim to derive title, was rendered against the company on the 5th day of September, 1856, lacking but five days of being one year after the deed to the father of appellees was recorded. The judgment did not become a lien on this land, so as to affect appellees' title. The purchaser under the execution acquired no title, because there was none in the land, which had been previously conveyed to the ancestor of appellees, and the deed duly recorded; and the purchaser took with notice, and hence acquired no title.

The evidence fails to show that appellant laid the founda-

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Opinion of the Court. Syllabus.

tion to read the tax deed in evidence as paramount title. He offered to prove none of the requisite steps which were indispensable to a valid tax sale. They did not produce the judgment and precept, and the court did not err in rejecting the tax deed as evidence of paramount title. Nor was it offered as color of title, nor could it be so used unless continuous payment of all taxes legally assessed, for the statutory period, with the requisite possession, could have been shown, which was not done or proposed to be proved.

A careful examination of this record fails to show any error, and the judgment of the court below must be affirmed.

Judgment affirmed.

ABNER MITCHELL *et al.*

v.

ARCHIBALD McDUGALL.

1. RESCISSION OF CONTRACT *for fraud—general rule.* On the principles of equity and justice, a contract to be obligatory must be justly and fairly made. The contracting parties are bound to deal honestly and act in good faith with each other. There should be a reciprocity of candor and fairness.

2. SAME—*false representations.* A false representation by the vendor which influences the conduct of the other party, and induces him to make the purchase, will vitiate and avoid the contract. And in making the representation it is immaterial whether he knows it to be false or not, for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury.

3. SAME—*suppression veri.* The undue concealment, which amounts to a fraud, for which a court of equity will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et de jure* to know. Under such circumstances the concealment of an important fact would be improper and unjust; it would be an undue concealment on account of the fiduciary relation existing; but, where the parties, in the absence of any such relation,

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Syllabus.

are treating for an estate, and the purchaser knows from surface indications, or otherwise, there is a valuable mine upon the land, he is not bound to disclose that fact to the owner; for the means of information on the subject are as accessible to the one as to the other. The concealment of facts of which the other party is ignorant, must be by a party who is under some special obligation, by confidence reposed, or otherwise, to communicate them truly and fairly, to justify a court of equity in taking cognizance.

4. *SAME—suggestio falsi.* In this case the plaintiff and defendant made an exchange of property, the plaintiff conveying to defendant a lot and residence in the city of Bloomington, which he valued at five thousand five hundred dollars, for one hundred and sixty acres of land, and a lot and a half in the town of Montevallo, all in Missouri, which was conveyed by defendant to plaintiff. The defendant assumed an incumbrance of one thousand dollars on the Bloomington property, and gave his note for three hundred dollars, difference in the exchange. The plaintiff had never seen the Missouri property, while defendant was well acquainted with it. Plaintiff was induced to make the exchange solely upon the representations of defendant; that the land was good land, and the same occupied by Judge Smith before the rebellion, and improved by him; that the land was worth twenty dollars an acre; and that there was a house a story and a half high on the lots, worth one thousand dollars, which was a desirable residence, renting for eight dollars per month. The land conveyed was not the Smith farm; was stony, poorly timbered, and comparatively worthless, and had been purchased by defendant a short time before for four dollars an acre. The Smith farm was worth probably fifteen dollars an acre. The house in Montevallo proved to be a mere shell, one story high, occupied by hogs and goats, unfit for human abode, and not worth over two hundred and fifty dollars. As soon as plaintiff discovered the facts, he demanded of defendant a rescission of the contract and a reconveyance of his property, and made a tender of deed for Missouri property and defendant's note of three hundred dollars. On refusal he filed his bill for rescission, and pending the suit the house was burned, the defendant having insured same at three thousand dollars. The circuit court dismissed the bill: *Held*, that the court erred in dismissing the bill on the facts of the case; and that as the plaintiff made the contract wholly on the representations of defendant, which proved to be untrue, and did not receive the property he contracted for, he was entitled to have the contract rescinded.

5. *MISTAKE.* In such case the defendant admitted there was a mistake in his conveyance of the Missouri land in not describing the Smith land, and offered to correct his deed so as to convey in fact the Smith farm, and insisted that a mistake in his conveyance was no ground of rescission; but it was held, in view of the fraud practiced upon the plaintiff, it would be unjust to allow the defendant to correct the mistake, and thus retain the contract as made; and that, under the circumstances of the case, the plaintiff had a right to take advantage of such mistake and repudiate the entire contract.

Syllabus. Statement of the case.

6. *RESCISSON for fraud—evidence.* On bill filed to set aside a deed given for land in exchange for other lands, on the ground that the contract was induced by false representations of the location, quality, and value of the lands taken in exchange, the defendant offered to prove that the property conveyed by him was equal in value to the property conveyed by the complainant. *Held*, that the proof was irrelevant, the question in such case being whether the complainant received in exchange what he bargained for and had a right to expect from the representations upon which he relied in ignorance of the facts.

7. *RESCISSON—disposition of insurance on loss by fire.* Where the purchaser of real estate had made an addition to the buildings thereon, and effected an insurance on the whole, and pending a bill by his grantor to rescind for fraud, the buildings were consumed by fire, when the insurance company was made a party by supplemental bill, it was held that a court of equity, in decreeing a rescission, would place the parties in *statu quo* as far as possible; and that, as the insurance money represented the buildings destroyed, it was proper, after deducting the premiums paid by the defendant, and the cost of the addition, to require the company to pay the balance of the insurance money to the complainant.

8. *WITNESS—competency of wife.* Where the husband, being the owner of property which was his homestead, exchanged the same for Missouri lands, taking a conveyance therefor to his wife, and afterward united with his wife in a bill for rescission on the ground of false representations, and on the hearing offered to prove, by his wife, the representations of the defendant, which the court refused to allow: *Held*, that the court ruled correctly, as the suit was not the case of the wife in any correct legal sense.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was a bill in chancery, by Abner Mitchell and wife, to rescind a conveyance of real estate, in the city of Bloomington, made by them to defendant in exchange for certain lands and town lots in the State of Missouri, which defendant conveyed to plaintiff's wife, on the ground of misrepresentation and fraud. Pending the bill, the buildings on the Bloomington property were destroyed by fire, defendant having effected an insurance thereon for \$3,000. This fact was shown by a supplemental bill making the insurance company defendant. At the time of the exchange there was an incumbrance of \$1,000 on the Bloomington property, which defendant assumed. He also

Statement of the case. Opinion of the Court.

gave Mitchell his note for \$300, difference in the exchange. After his purchase he made an addition to the buildings conveyed to him which were embraced in his insurance. On the hearing, Mitchell offered his wife as a witness to prove the representations made by defendant as to the condition, quality, and value of the Missouri property, which the court refused to permit. The court, on the hearing, dismissed the bill.

Mr. R. E. WILLIAMS, for the appellants.

Messrs. BENJAMIN & WELDON, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court :

In *Lockridge v. Foster*, Adm'r, 4 Scam. 569, which was a bill in chancery praying, in the alternative, for the rescission of an executed contract for the sale of land, on the ground of fraudulent representations by the vendor, this court said, on the principles of equity and justice, a contract, to be obligatory, must be justly and fairly made. The contracting parties are bound to deal honestly, and act in good faith with each other. There should be a reciprocity of candor and fairness. Both should have equal knowledge concerning the subject-matter of the contract; especially ought all the facts and circumstances which are likely to influence their action to be made known. If they have not mutually this knowledge, nor the same means of obtaining it, it is then a duty incumbent on the one having the superior information to disclose it to the other. In making the disclosure, he is bound to act in good faith and with a strict regard to truth. If he makes false representations respecting material facts, or intentionally conceals or suppresses them, he acts fraudulently, and renders himself responsible for the consequences which may result. Fraud may consist as well in a *suppressio veri* as in a *suggestio falsi*, for, in either case, it may operate to the injury of the innocent party. A false representation by the vendor, which influences the conduct of the other party, and induces him to make the purchase, will vitiate

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and avoid the contract. And in making the representation, it is immaterial whether he knows it to be false or not, for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury. So a suppression or concealment by the vendor of facts, which, if known to the vendee, would have the effect to prevent him from making the purchase, will, in equity, equally vitiate the contract. A court of equity will not enforce and carry into effect contracts thus unfairly and fraudulently made; and when the injured party invokes its aid in proper time, and the circumstances of the case will permit it to be done, the contract will be rescinded and the parties restored to their original rights.

The court refers to 1 Story's Eq., §§ 191, 197, 204, 207, and 2 Kent's Com. 482, 490.

Sections 191 to 197, inclusive, treat of false suggestions, and fully support the doctrine of the case cited, on that point. Sections 204 to 207, inclusive, treat of the doctrine of *suppressio veri*, a doctrine which, though true in morals, is not the doctrine recognized by courts of equity, except under certain circumstances.

The extreme doctrine of some courts is, that undue concealment of a fact resting in the knowledge of one contracting party, which, if known to the other, would have prevented the contract, will vitiate the contract.

The true definition is found in section 207, *supra*, where it is said undue concealment which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et de jure*, to know.

Under such circumstances, the concealment of an important fact would be improper and unjust; it would be an undue concealment on account of the fiduciary relation existing; but where two parties, in the absence of any such relation, are

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treating for an estate, and the purchaser knows, from surface indications, or otherwise, by actual boring, there is a valuable mine upon the land, the purchaser is not bound to disclose that fact to the owner, for the means of information on the subject were as accessible to the owner of the land as to the purchaser.

The rule stated by Chancellor Kent, at page 482, referred to in the opinion in 4 Scam., *supra*, is that each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.

This, we admit, is a rule of moral obligation, but not enforced in the courts. It is by them qualified, as we have stated above, that the party in possession of the facts must be under some special obligation, by confidence reposed, or otherwise, to communicate them truly and fairly, and this is the doctrine of this court in the case of *Fish v. Cleland*, 33 Ill. 243, and *Cleland v. Fish*, 43 id. 282, referred to by appellee's counsel.

It is qualified by *Beach v. Sheldon*, 14 Barb. 72; *Laidlaw v. Organ*, 2 Wharton, 178; *Knitzing v. McElrath*, 5 Penn. St., 467.

In *Fox v. Mackeath*, 2 Brown's Ch. R. 400, Thurlow, Lord Chancellor, in delivering the opinion in the case where undue concealment of an important fact was charged, said: "The doubt I have is, whether this case affords facts from which principles arise to set aside this transaction, which will not, by necessary application, draw other cases into hazard. And, without insisting upon technical morality, I don't agree with those who say, that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. Suppose, for instance, that A, knowing there to be a mine in the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate without considering the mine, could the court set it aside? Why not, since B was not apprized of the mine and A was? Because B, as the buyer, was

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not obliged, from the nature of the contract, to make the discovery. It is, therefore, essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery." Not, as Justice Story says, § 148, 1 Story Eq., from an obligation in point of morals only, but of legal duty. In such a case he says, a court of equity will not correct the contract merely because a man of nice morals and honor would not have entered into it. Lord Eldon, in *Turner v. Harvey*, Jacob R. 178, approved the doctrine of Lord Thurlow and the illustration of the mine, and so does Justice Story in § 207, 1 Eq. Jur.

But we are dealing in this case with the doctrine of *suggestio falsi* and not of *suppressio veri*, as the charge in the bill is, false representations made by appellee of the value of the land and lots in Missouri.

There is much testimony in the record, from which we derive the knowledge that appellee represented to appellant, who had never been in Missouri (appellee having resided there before coming to Bloomington), that the land was good land, and was the land occupied by one Judge Smith, before the rebellion, and improved by him. This land was the south part of section eighteen and the north part of section twenty-four, in all one hundred and sixty acres, and was worth, probably, fifteen dollars per acre. The land conveyed was in section fifteen, stony, poorly timbered, and comparatively worthless. The house in Montevallo, instead of being a desirable residence, and worth one thousand dollars, as represented by appellee, proved to be a mere shell, one story high, occupied by hogs and goats, bringing not eight dollars a month rent "right along," as represented, but unfit for human abode, and worth, with the "lot and a half," not over two hundred and fifty dollars, and, as we should judge, not at all saleable. So soon as appellant, by personal inspection on a visit to the locality, discovered the facts, he came to the conclusion appellee had imposed upon him, and at once, on his return to Bloomington, demanded a rescission of the contract and a reconveyance of

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the Bloomington property, and tendering deeds for the Missouri property, together with appellee's note for three hundred dollars, part of the purchase money. This being refused by appellee, this bill was filed by appellants, and pending the bill the house was consumed by fire, on which, however, appellee had effected an insurance of three thousand dollars.

The court dismissed the bill and complainants appealed.

There is no question of law made except the one we have discussed, and there is some conflict in the testimony, but a careful examination of it, as we find it in the record, satisfies us appellant has not received from appellee what he contracted for, and which contract he made wholly on the representations of appellee, which have proved to be untrue.

It is said by appellee, there was a mistake in conveying the land as in section fifteen—that he supposed the “Smith farm” was on that section, but is willing and offers to convey the land in fact occupied by Smith in sections eighteen and twenty-four, and he insists, that a mistake being made is no ground for the rescission of the contract, as the court can and will correct the mistake. But this consideration should not prevail in this case, because appellee represented the land he was selling to be worth twenty dollars per acre, which he had purchased but a short time previously for four dollars per acre, and he asserted to appellant that such land was selling for twenty dollars an acre in that neighborhood. This he based upon a letter said to have been received by him from one Selsor, a land agent in that county. Selsor in his deposition says, the lands he referred to in that letter were among the best improved farms in that portion of Cedar and Vernon Counties; he says he had no idea of fixing the price of raw lands by these figures, and did not suppose any one would be so foolish as to attempt it.

That letter, which appellee says was burnt up in the building when it was destroyed, was to this effect: “We have sold within the last two weeks ten thousand dollars worth of land, from fifteen to twenty-five dollars an acre.” This

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was so construed by appellee to appellant as to induce the latter to believe they were lands in the neighborhood of those he was about to purchase.

The town property was of small value. Now, under such circumstances, it would not be just to allow appellee to correct the mistake in the land and claim the contract as made, but it would be just, as a mistake was made by appellee in the deed, to permit the injured party to avail of it, and, through that, repudiate the entire contract. In a case where false representations have been made, it is the province of a court of equity, if applied to for that purpose, to rescind the contract, putting the parties in *statu quo*.

It is claimed by appellee that the Bloomington property was taken at a very high valuation, and that he ought to be permitted to show that appellant has received from him its full value.

This we do not consider as the question before us. The question is, did appellant get what he bargained for? That he did not we think the evidence satisfactorily shows.

Appellant's right to the insurance money will hardly be questioned, as the building upon the lot when sold, is now represented by that money, and after deducting the premium paid by appellee and the cost of the addition to the building which he erected, and was covered by the insurance, we are of opinion the company should pay the balance to appellant.

On the point that Mrs. Mitchell, appellant's wife, was improperly rejected as a witness, we think the court ruled correctly; the case was in no correct legal sense her own case.

The views here expressed reverse the decree of the circuit court dismissing the bill. The cause is remanded for further proceedings consistent with this opinion.

Decree reversed.

SCOTT, J., did not hear the argument in this case, and gave no opinion.

Syllabus. Statement of the case.

LEONARD RIGOR

v.

JAMES H. FRYE *et al.*

1. **COLOR OF TITLE—limitation.** A bond conditioned for the execution and delivery of a deed upon a compliance with its terms in the future is not color of title within any fair construction that has been or can be given to the 8th section of Ch. 24 R. S. 1845. It does not, on its face, purport to convey title.

2. **SAME.** To constitute color of title under either the eighth or ninth sections of this statute, the deed or instrument must purport, on its face, to convey the title to the land to the grantee named. It must apparently transfer the title to the holder of an interest in the land to enable him to invoke the aid of either section of the statute.

3. **SAME.** In ejectment, the plaintiff showed a *prima facie* title to the land in controversy. The defendant had been in possession of the premises seven years before the institution of the suit, and had paid all the taxes legally assessed thereon during that period, but had no deed purporting to convey the title to the same during the first four years of his possession. During that period he only held a bond for a deed from a person whose only claim to the land was a certificate of purchase at a tax sale: *Held*, that the defendant could not invoke the aid of the eighth section of the conveyance act to defeat a recovery.

4. **SAME.** It seems that no distinction can be taken as to what constitutes color of title under the eighth and ninth sections of the conveyance act.

APPEAL from the Circuit Court of Brown County; the Hon. C. L. HIGBEE, Judge, presiding.

This was an action of ejectment for the recovery of a tract of land in Brown County. After the defendant below had closed his case, the court, on motion, excluded from the jury all the oral evidence of defendant's possession and payment of taxes, to which defendant excepted. The court instructed the jury that the plaintiff below had made out a legal title to the premises, and that the defendant had failed to show any claim and color of title, as required by the statute, and that they should find for the plaintiff. Verdict accordingly.

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Mr. W. L. VANDEVENTER and Mr. J. C. THOMPSON, for the appellant.

Mr. J. S. IRWIN, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court :

It is admitted, by a stipulation in the record, that the appellees have shown a *prima facie* title to the premises in controversy sufficient to authorize a judgment in their favor, unless the appellant, by his proof, has brought himself within the protection of the eighth section chapter twenty-four R. S. 1845.

The single inquiry involved in the case is, whether a bond for a deed upon condition of a compliance with its terms *in futuro* will constitute "claim and color of title" within the meaning of that section of the conveyance act.

It is not controverted that the appellant was in possession of the premises seven successive years, and paid all the taxes legally assessed thereon during that period.

It is conceded also, that the appellant had no deed purporting to convey the title to the premises during the first four years of his possession. During that period he only claimed to have a bond for a deed from one Edward M. Clark. The only title claimed by Clark himself to the land, was a certificate of purchase at a tax sale. He did not claim any title to the land through any one who claimed to own it under a deed purporting to convey the title.

We do not understand that any distinction can be taken as to what constitutes "color of title," under sections eight and nine of the conveyance act. Hence, the definitions given as to what constitutes "color of title" in the former decisions of this court under one section, may apply with equal exactness to the other.

It was held in *Bride v. Wall*, 23 Ill. 507, that a certificate of purchase at a tax sale did not constitute color of title under the ninth section of the conveyance act. The decision

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proceeds on the ground that it is not paper title, within the meaning of the statute, and does not purport in terms to convey the title.

For the same reason, it was held in *Spellman v. Curtenius*, 12 Ill. 409, that a certificate of a land office, showing that at one time a party was entitled to a pre-emption did not constitute color of title.

To constitute color of title under either section of this statute, the deed or other instrument must purport on its face to convey the title to the land to the grantee named. It must apparently transfer the title to the holder of an interest in the land invoking the aid of either section of this statute. *Bride v. Wall, supra*; *Dickenson v. Breeden*, 30 Ill. 279; *Morrison et al. v. Norman et al.*, 47 Ill. 477; *Huls v. Buntin*, 47 Ill. 396.

In the case before us, the bond did not purport on its face to convey the title to the land to the appellant. It was, at most, an executory agreement, entitling the appellant at a future day to a deed that would convey the title, in case he should comply with certain conditions. It did not constitute "paper title" in the sense in which those words are used in the statute. The appellant, therefore, had no color of title, within any fair construction that has been, or can be, given to the statute, nor did he hold any claim or color of title from any one, who, himself, had color of title.

Inasmuch as it does not appear from the record that he had color of title to the land in controversy, accompanied by possession and payment of taxes for the requisite length of time, to which he could invoke the aid of the eighth section of the conveyance act, to protect his possession, the judgment must be affirmed.

Judgment affirmed.

Syllabus.

THE PEOPLE OF THE STATE OF ILLINOIS.

v.

ILLINOIS CENTRAL R. R. Co.

1. *MANDAMUS—return.* The return to the alternative writ in this case having traversed all the material allegations in the writ, a demurrer thereto was overruled, and leave given the relator to withdraw the same, and make an issue of fact.

2. *SAME—when granted.* A writ of mandamus is never granted, of course, but only at the discretion of the court, and only where some just and useful end is to be attained.

3. *ILL. CENTRAL R. R. Co.—sale of its lands on credit.* By the act of 1854 (Sess. Laws 192), a reasonable discretion was granted to this company to sell its lands upon credit, and authority may properly be inferred to fix a reasonable minimum price.

4. *SAME—abuse of power.* The courts have power to control any attempted abuse of the authority to sell on credit. The credit should not be extended so long as to postpone to an indefinite or an unusual time the day of payment. The price should not be so regulated as to prevent, or unreasonably retard, sales.

5. *SAME—collecting purchase money.* The company should not permit purchasers to retain the purchase money after maturity to evade the law, or with the view of relief from taxation, but should use all usual and reasonable efforts to enforce collections without unnecessary harassment or rigorous oppression of the debtor. Ordinary delay, not intended to further any bad or unlawful purpose, will not afford sufficient grounds for awarding a writ of mandamus.

6. *SAME—compelling sales.* The provision in the charter of the company directing that all the lands remaining unsold at the expiration of ten years from the completion of the road and its branches, shall be offered at public sale annually, until the whole is disposed of, imposes a duty in such vague and general terms, that this court, in view of the serious consequences and difficulties in the way, does not feel justified in enforcing it by *mandamus* without further legislation. If the legislature should prescribe the terms of sale, the mode in which it should be conducted, not inconsistent with the rights of the company, and make the directions plain and definite, this court can then act upon its requirements and enforce them.

This was a petition filed by the attorney general, on behalf of the people, praying for a writ of *mandamus* against the Il-

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Opinion of the Court.

Illinois Central Railroad Company. The facts and objects are stated in the opinion of the court.

Mr. W. BUSHNELL, Attorney General, for the people.

Messrs. HAY, GREENE & LITTLER, for the respondent.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The attorney general filed a petition, in behalf of the people, asking for a writ of mandamus against the Illinois Central Railroad Company. The case has been submitted as upon a demurrer to the return to the alternative writ.

The allegations to which our attention is first invited, are, that the company has sold divers tracts of its lands granted to it by the State, to divers persons, and has agreed to convey the same at the expiration of four years; that the purchasers have entered into possession, and made valuable improvements thereon; that the lands so sold are now worth, upon an average, thirty dollars per acre; that the company, by its servants and agents, fraudulently and unlawfully agreed with the purchasers, that it would execute a written agreement to convey, upon the express contract and understanding that the purchasers should pay the purchase money—*less a few dollars*—so as to exempt the lands from the payment of State, county, and municipal taxes, by virtue of the following clause in the charter of the company:

“The lands selected under said act of Congress, and hereby authorized to be conveyed, shall be exempted from all taxation under the laws of this State, until sold and conveyed by said corporation or trustees;” and that the company has sold certain lands in the county of LaSalle, which are described, to divers persons, but has not conveyed the same; that the purchase money has been nearly all paid, and in some instances fully paid; and that all this has been done with the purpose and intent of defeating the collection of taxes upon the lands so sold.

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The respondent, in its return, positively denies all of the foregoing allegations, and states that they are wholly untrue as charged; that it has endeavored to dispose of the lands, and collect the purchase money for those sold; that if payments have been withheld, it has not been done with the consent of the company; that it has in its employ eight persons, whose sole duty it is to make sales and collect moneys due; besides about seventy station agents, who are authorized to sell lands and collect purchase money; that deeds have been executed in all cases where the lands have been paid for, and such lands reported to the auditor, except in three instances, in which the purchasers have failed to surrender their contracts of purchase and receive their deeds; and that no stipulation or contract has been made with any person that payments and deeds might be withheld for the purpose of avoiding taxation.

It will be seen that the return traverses the allegations of the writ, which charge a collusive retention by the company of the title to lands sold, and wholly or partly paid for, for the purpose of their exemption from taxation. To this portion of the return the demurrer will, therefore, be overruled, and the relator will have leave to withdraw the demurrer, and make an issue of fact.

The original charter of the company directed the sales of lands for cash in hand, or the bonds of the company at par. This clause in the charter was repealed by an amendatory act in 1854. Sess. Laws 1854, 192. This amendment authorized the company to dispose of its lands upon such credit as might be deemed expedient, by contracts for sale and conveyance; and provided that no conveyance of the title should be made until the purchase money should be paid.

Thus, a reasonable discretion was granted to the company to sell upon credit; and authority might properly be inferred to fix a reasonable minimum price. Courts can control any attempted abuse of the authority conferred. The credit should not be so extended as to postpone, to an indefinite or unusual time, the day of payment. The price should not be so regu-

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lated as to prevent, or unreasonably retard, sales. Neither should purchasers be permitted to retain the purchase money after maturity, with any purpose of an evasion of the law, or with the view of relief from taxation.

The right to sell upon credit necessarily implies some delay in the collection of the purchase money. The company should use all usual and reasonable effort to enforce collections, without unnecessary harassment, or rigorous oppression of the debtor. But ordinary delay, not intended to further any bad or unlawful purpose, should not invoke the writ of mandamus, which is never granted, of course, but only at the discretion of the court, and when some just and useful end is to be attained.

The alternative writ next alleges that it was the duty of the company, at the expiration of ten years after the completion of its road, to offer, at public sale, annually, all lands remaining unsold, until the whole is disposed of; that the road has been completed for the space of fifteen years last past; and that after the completion of the road, and the expiration of ten years, there remained a large amount of unsold lands.

As to the duty of the company, in this regard, the following is the provision of the charter:

“And all lands remaining unsold at the expiration of ten years after the completion of said road and branches, shall be offered at public sale, annually, until the whole is disposed of.”

The prayer of the petition is, that an order be entered, commanding the respondent to offer and expose, at public sale, in manner and form as required by law, all lands now remaining unsold.

The return shows that there was granted to the company about two and a half millions of acres of lands; that at the expiration of ten years from the completion of the road, there only remained unsold, a fraction over eight hundred thousand acres; that over half of this quantity was sold in the years 1868 to 1871, inclusive; that, in endeavors to effect sales, in advertisements, agencies, etc., the company has expended more

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than one million and eight hundred thousand dollars; and that, in 1871, it attempted sales at public auction, but without success.

The facts in the return, admitted to be true by the demurrer, show, on the part of respondent, some efforts to dispose of the unsold lands.

But, without any regard to the facts, we can not discern the propriety of an enforcement of the duty imposed upon the company in such vague and general terms, by mandamus. The requirement is, that all lands unsold at the expiration of ten years after the completion of the road, shall be offered at public sale, annually, until the whole is disposed of.

Shall we order the sale of the whole? This would be an assumption of power; for the law contemplated sales during a series of years, unless the whole was disposed of sooner. Shall we fix the terms of sale? The law is silent as to the terms, unless the clause of the charter under consideration is aided by the amendatory act of 1854, which seems to have reference solely to contracts for sale. Shall we direct the time of the year and the places? It would be arbitrary so to do in the absence of any specific directions in the law; and we might thus seriously endanger the rights and interests of the respondent, and cause a sacrifice of the lands without facilitating the object of the law.

Besides, the principal of the bonds authorized to be issued by the charter, was not payable until the year 1875, and then payment was secured by a deed of trust upon the lands. Did the legislature intend that the courts might force a sale of the lands for any—a mere nominal price—without any regard to the deed of trust, and the many thereby to be protected? Then the security intended to be afforded, and which is expressly provided for in the charter, and upon the faith of which the money, for the construction of the road, must have been furnished, becomes a mere empty bubble, by the fiat of a court.

There is too much uncertainty in the language imposing the duty upon the respondent; the consequences to be feared are

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too serious to justify the court to enforce the duty by mandamus without further legislation.

If the legislature should prescribe the terms of sale, the mode in which it should be conducted, not inconsistent with the chartered rights of the company, and make the directions plain and definite, we can then act upon its requirements and enforce them.

In the view which we are compelled to take of the law, the peremptory writ is refused.

Mandamus refused.

JAMES TUTTLE

v.

FRANCIS RIDGEWAY.

1. *DECLARATION—when sustained by evidence.* A declaration for a specific sum, averring that the amount has reached the defendant's hands to the use of the plaintiff, is good for any portion of the sum which may be proved.

2. *PROMISE—what is a good consideration for.* If A owe B and give his order on C for a sum that may come into the hands of C, to his use, and C accept the order, he is liable to B for so much of that sum as shall come to his possession, his acceptance being a promise founded upon a sufficient consideration.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WELDON & BENJAMIN, for the appellant.

Mr. M. W. PACKARD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

The declaration sets out that Snider gave to the plaintiff his order in writing on the defendant, to pay to the plaintiff the sum of six hundred dollars, and that afterward the de-

Opinion of the Court.

fendant promised to pay the said sum of six hundred dollars to the plaintiff, when the same should come into his hands, of moneys belonging to Snider, averring that thereafter there came into defendant's hands of such money a large sum, to-wit: seven hundred dollars. As the evidence shows that only two hundred and eighteen dollars of the money of Snider came into the hands of the defendant, it is objected that it does not sustain the declaration; that to make out a cause of action under it, six hundred dollars of such money must have been received by the defendant. We think this would be adopting a too literal construction of the language of the declaration. We regard the legal import of the promise as therein laid, to be, to pay whatever amount, not exceeding six hundred dollars, of the moneys of Snider that should come into the hands of the defendant; and that it was not essential to a recovery of the two hundred and eighteen dollars, which was had in this case, that the full sum of six hundred dollars should have come into defendant's hands.

As to the objection that there was no consideration for the promise, the funds of Snider in the hands of the defendant, and the extinguishment of his liability to Snider in respect to them, so far as covered by the order, constituted a sufficient consideration.

The point is made that the finding of the court below was against the clear preponderance of the evidence. After a careful examination of it, we find it to be conflicting in regard to the acceptance of the order, but see no sufficient reason for disturbing the finding of the court upon it.

The judgment must be affirmed.

Judgment affirmed.

GEORGE W. WILLIAMS

v.

DENNIS R. WALKER *et al.*

1. JUDICIAL SALE—*administrator purchasing at his own sale.* Where an administrator is the real purchaser at a sale of land by him for the payment of the debts of his intestate, by procuring another to bid off the land for his benefit, and such nominal purchaser, shortly after receiving a deed, conveys the premises to the administrator, a court of equity will set aside the sale on the application of the heirs.

2. FORMER ADJUDICATION—*when bar to suit.* A bill was filed by the heirs-at-law of a deceased person to set aside a sale of land made by the administrator under an order of court, on the ground that he was the real purchaser at his own sale, through the medium of a relative, who, after receiving a deed from the administrator, conveyed the premises to the latter. It was shown that on a former bill filed by the widow and infant heirs against the administrator, a decree was entered, by consent, setting off to the widow a homestead in the premises, the bill seeking no other relief: *Held*, that the decree in the prior suit was no bar to the second bill, as the matters involved in it were not adjudicated in the prior bill.

APPEAL from the Circuit Court of Greene County; the Hon. CHARLES D. HODGES, Judge, presiding.

Messrs. ROBINSON, KNAPP & SHUTT, Messrs. BURR & WILKINSON, and Mr. HENRY C. WITHERS, for the appellant.

Mr. D. M. WOODSON & Mr. H. JOHNSON, for the appellees.

Mr. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was a bill in chancery, brought by the heirs of Walker, against Williams, his administrator, to set aside a sale of real estate made by the latter for payment of debts. The sale is attacked on the ground that the land was sold and conveyed to Pankey, the father-in-law of Williams, for the benefit of the latter, by virtue of a previous arrangement between them.

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Pankey conveyed to Williams a few months after the sale. The court set the sale aside on equitable terms.

It is unnecessary to review the evidence. It clearly shows that Williams was the real purchaser at his own sale, and, of course, the heirs have the right to set the sale aside.

It is also objected that the decree pronounced in a former suit has settled this controversy, and is conclusive upon these complainants. That bill was brought by the widow, in behalf of herself and her three minor children, for the purpose of having her homestead set off to her. Williams and the adult children were made defendants. It is true, the bill in that case, as in this, contained an allegation that the administrator was the purchaser, and that the sale was fraudulent; but the object of the suit was to secure a homestead.

Before any evidence was taken the parties agreed that the widow was entitled to a homestead, and entered into a stipulation naming two commissioners, who, with a third to be chosen by them, were to assign the homestead to the value of \$1,000, and to determine the rents to which the widow might be entitled, she relinquishing her right of dower. It was also agreed their report should be the basis of a decree. They made a report assigning the homestead and allowing the widow certain rents, and the court embodied it in the decree and dismissed the suit at the cost of Williams. Whatever might be the effect of that litigation upon the widow, who is not a party to this suit, it did not conclude the heirs from asserting their right to have the sale rescinded. As already stated, only the minor heirs were joined with the widow as complainants, and the only matter settled by the decree was the homestead right of the widow, and this decree was pronounced by consent. If a decree had been pronounced upon the matter at issue here it would have been binding on the minors until reversed or set aside; but no such decree was rendered, nor was this matter submitted to the court.

We find no error in this record.

Decree affirmed.

Syllabus.

CITY OF JACKSONVILLE

v.

EDWARD LAMBERT.

1. **MUNICIPAL CORPORATION—liability for tort—nuisance.** Even though the authorities of a city may be under a legal duty to afford sufficient drainage for the health and comfort of the inhabitants, and, in the discharge of such duty, construct a sewer or drain after the most approved plan, using the best material, and the work is done in the most skillful manner, yet they have no right thereby to concentrate the dirty water, offal, and filth of the city or any portion thereof, and discharge the same upon the premises of an individual; and if, in so doing, a private injury is sustained, the city will be liable for the damages. It must so construct such improvement as to avoid injury to individual property.

2. **SAME—discharging filth on private property.** Where a city constructed a sewer so that the garbage, suds and slops, offal and filth from the dwelling-houses and woolen mills by which it run was conducted, discharged, and flowed upon and through the real estate of the plaintiff, situate in the city and near the terminus of the sewer, corrupting and polluting the atmosphere so as to render the land unsaleable and unsuitable for residences, and otherwise injure the use of the land or a portion thereof: *Held*, that the city was liable to the plaintiff in case for the damages sustained.

3. **SAME—condemnation.** If, in abating or removing a public nuisance by a system of sewerage or drainage, it unavoidably inflicts an injury to private property, the corporate authorities should, by condemnation or otherwise, make compensation for the injury.

4. **DAMAGES—exemplary.** Where a city, in constructing a sewer in good faith, of good material, and in a skillful manner, has caused an injury to private property by the flow of offal and filth from the terminus of the sewer upon and through such property, punitive damages are not authorized.

5. **EXCESSIVE DAMAGES—tort.** In this case the city had constructed a sewer terminating near a tract of about fifty acres of plaintiff's land, whereby the offal and filth of a portion of the city was discharged and flowed over part of the tract, cutting off about six acres; but the work, at the time of the trial, was so changed that it was no longer a nuisance, and it did not appear that plaintiff or his family had suffered any considerable annoyance; but the principal claim and proof of damage was based upon an assumption of an injury in being prevented from effecting sales of the lands for residences. The jury rendered a verdict for \$1,900 damages: *Held*, under the circumstances, to be grossly excessive, and ground for a new trial.

APPEAL from the Circuit Court of Morgan County; the Hon. C. D. HODGES, Judge, presiding.

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Statement of the case. Opinion of the Court.

This was an action on the case by Lambert against the city of Jacksonville. The declaration set forth in substance that plaintiff was possessed and seized of certain tracts of land, containing fifty acres, in the limits of the city, of great value, and suitable for residences; that defendant, in the exercise of its corporate powers, constructed and built a sewer, giving its commencement, courses and terminus, so that large quantities of foul, nauseous, noxious, putrid, etc., substances, liquids, and matter flowed out of such sewer, and from thence into, upon, and over some of the aforesaid tracts, rendering the air unwholesome and offensive, etc., whereby the plaintiff had been greatly annoyed and disturbed in the enjoyment of said lands, and the sale thereof destroyed, and the value greatly depreciated.

The testimony showed that the terminus of the sewer was about three hundred feet from the nearest part of the plaintiff's land, and that the flowings from the sewer passed over and cut off about six acres of plaintiff's land. The plaintiff lived about half a mile from the flow. Plaintiff testified: "I estimate my damages principally on the ground that I couldn't sell my lands in part or in whole on account of the outflowing of the sewerage upon the premises." The other material facts appear in the opinion.

Mr. OSCAR A. DE LEUW and Mr. I. L. MORRISON, for the appellant.

Mr. J. T. SPRINGER and Mr. H. STRYKER, JR., for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It is first insisted, that the city is not liable to appellee for damages he may have sustained by reason of constructing the sewer so as to discharge the drainage from the city upon the premises of appellee. And it is said that cities have been compelled to construct such improvements for the preservation of the health of their citizens and for the promotion of their

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comfort. And it is urged that the work was skillfully and well done. This may all be conceded, and still it does not follow that liability would not attach. It may be true that a city is liable to be compelled to afford sufficient drainage for the health and comfort of the people, but that would not authorize them to so construct the work as to destroy or seriously impair the value of the property of an individual. No one would suppose that the city would have the right by drainage and sewerage to collect all of the dirty water, swill, putrid matter, and garbage of the city, or any portion thereof, and lead it to and discharge it in the door-yards of a portion of the inhabitants. That would be an invasion of private rights; that would be violation of every rule of law, and shock the sense of justice entertained by every fair-minded man.

Nor would it be in the slightest degree either a defense or excuse, to show that such a sewer or drain was constructed of the best material, and the work performed in the most skillful manner, and the plan on the most approved model. In performing such duties they are required to construct such improvements in such a manner as to avoid injury to individual property. They have no right to concentrate the offal and filth of a city, which is a nuisance to the public, and discharge it upon the premises of an individual. If a public nuisance, and there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, make compensation. Every principle of justice and the dictates of reason would say that it is wholly wrong to impose the burden of the nuisance on one or a few citizens.

This precise question has not been before us, but in *Nevins v. The City of Peoria*, 41 Ill. 507, and *The City of Aurora v. Reed et al*, 57 Ill. 29, the same principle has been announced. In those cases it was held that the city had no right to so construct the drainage over the surface as to concentrate it on individual property; and if they should, they would be held liable for the damages thus inflicted. And

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the rule must apply with more force when all of the filth of various kinds accumulated and produced in a particular portion of the city is confined to a large sewer and carried and discharged on private property, with its concentrated gases and offensive odors produced by putrefaction. The city had no right to impose such a burden upon one individual, and in doing so, if injury was sustained, it must be held liable to make compensation.

It is next urged that the damages are so excessive that the judgment should be reversed. We regard this objection as well taken. It is not pretended that the noisome smells and offensive odors produced at the place where this sewer discharged this fetid water and matter, annoyed appellee or his family to the extent of the damages recovered. There could not be the least semblance of reason to say that such annoyance caused injury to the amount of \$1900. But it is said, that the damage was sustained by depreciation in the value of the property upon which the sewer discharged, and in the loss of profits that might have been realized on sales that could otherwise have been made. It appears that the work has been so changed that the sewer is no longer a nuisance to appellee's land. It is not, then, a continuing nuisance, and the question of damages is narrowed to the injury produced while it was continued.

Some of the witnesses, in estimating the damages, fixed the value of the land; estimated the interest upon the sum; fixed the rental value of the property; deducted the latter from the interest thus estimated, and took the remainder as the damages sustained; and the jury seem to have adopted some such theory, probably allowing a given time for the sale of the property in lots, and then estimated interest on the supposed purchase money from that time until the recovery was had. Such a mode of arriving at the damages is manifestly wrong. In the first place, the price for which the property would have sold is conjectural. That purchasers could have been found at any such prices is mere assumption, as far as this record discloses. And there is nothing to show that it, or any consider-

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able portion of it, could have been sold at the supposed value or even at reduced rates. To assume all of these conjectures as facts, and that must be done to warrant such an assessment of damages, was to act upon very remote conjectures.

It appears that appellee might, perhaps, have sold a small portion of the land for one thousand dollars. But there is no satisfactory evidence that the remainder could have been sold, or if it could, the price that could have been received is not shown. To sanction such a basis for the assessment of damages would be to authorize mere conjecture to be substituted for reasonable certainty. In such cases, only the damages actually sustained is the measure for a recovery. And the evidence should, with reasonable certainty, indicate the amount. And, while courts are reluctant to disturb verdicts because the damages are excessive in cases where there is no precise standard for their measurement, still the verdict must be sustained by the evidence. A jury in such cases do not have an unbridled license to fix such a sum as may be suggested by caprice, prejudice, or passion. This class of cases is unlike those in which punitive damages are authorized. In cases of the latter class, juries have some discretion; but not so in cases of the character of this. In looking at the testimony in any light in which we have been able to view it, we are constrained to hold that the damages are grossly excessive, and so much so that the finding of the jury should not be permitted to stand.

For this reason the court below erred in overruling the motion for a new trial, and the judgment is reversed and the cause remanded.

Judgment reversed.

GEORGE MONROE

v.

AMANDA E. POORMAN *et al.*

1. ACKNOWLEDGMENT OF DEED—*impeaching by parol evidence.* Where the certificate of acknowledgment of a mortgage in due form shows that the

62	523
142	166
62	523
164	123
62	523
179	62
62	523
196	2568

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wife relinquished her dower and homestead right, in the absence of fraud or imposition upon the wife, or combination between the mortgagee and the officer taking the acknowledgment, she will not be allowed to show in defense of a bill to foreclose that she did not in fact relinquish her dower and homestead right.

2. Where the certificate of the acknowledgment of a deed is in conformity to law, it can only be impeached for fraud or imposition. The certificate must be judged of by what appears upon its face. Therefore, proof negating the necessary facts shown therein, will not alone be sufficient to impeach the certificate.

APPEAL from the Circuit Court of Coles County; the Hon. JAMES STEELE, Judge, presiding.

Mr. JAMES A. CONNELLY, for the appellant.

Mr. O. B. FICKLIN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court :

This was a bill in chancery, in the Coles circuit court, to foreclose a mortgage. The widow and heirs-at-law of the mortgagor were made parties, and guardians *ad litem* appointed for the infants.

An answer was filed by the widow, oath being waived, in which she denied executing the mortgage and the acknowledgment thereof.

The acknowledgment was as follows :

“STATE OF ILLINOIS, }
COLES COUNTY, } ss :

“I, D. C. M. EVANS, a notary public in and for the city of Charleston, said county, in the State aforesaid, do hereby certify that Allison C. Poorman and Amanda Poorman, his wife, personally known to me as the same persons whose names are subscribed to the foregoing mortgage, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth. And

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the said Amanda Poorman, wife of the said Allison C. Poorman, having been by me examined, separate and apart, and out of the hearing of her husband, and the contents and meaning of said instrument of writing having been by me made known and fully explained to her, and she also by me being fully informed of her rights under the homestead laws of this State, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, and also all her rights and advantages under and by virtue of all laws of this State relating to the exemption of homesteads, voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract the same.

"Given under my hand and notarial seal, this 21st day of August, A. D., 1867.

[SEAL.]

"D. C. M. EVANS, N. P."

The widow was sworn as a witness, and she denied having relinquished her dower and homestead right. The notary public was sworn, and he testified that he told her when he gave her the mortgage to sign, that if she signed it, it would release her dower and homestead; does not recollect that he told her she was entitled to a homestead worth one thousand dollars; remembers he told her if she signed the mortgage, the act would be a relinquishment of her homestead and dower. Her husband having previously at another place signed it, she took the mortgage and went into another room of the house to sign it; she returned soon into the room where the notary was, and handed him the mortgage with her name signed to it. She said she had signed it; she seemed to be crying. The notary then told her she was not bound to sign or acknowledge the mortgage, and she said she understood it. The notary said to her: "You seem to be crying;" and she replied, "it was not on that account, but it was because Mr. Poorman was going into the kind of business he was, though it seemed he could not do any thing else, and she was willing to help him." She then acknowledged the mortgage as certi-

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fied by the notary. Her husband was not present at the time, nor was he about the house.

A. H. Chapman testified that the evening before the mortgage was executed he went to see Mrs. Poorman about signing the mortgage, and she did not want to sign it. He then went up town and saw the mortgagee and Poorman, and told them if they would send the mortgage down, he thought she would sign it. She was willing to sign a mortgage on the saloon, but not on the homestead, at that time.

Mrs. Poorman does not testify she did not know she was entitled to a homestead of the value of one thousand dollars, but only that the notary did not tell her so. The notary, who is a disinterested witness, positively swears that he told her, if she signed the deed she would be releasing her dower and homestead; and she knew the law gave her a homestead of the value of one thousand dollars in the property.

If the testimony of a wife, who may or not become a widow, is to prevail over her own deliberate act, done knowingly, and over the testimony of a disinterested officer taking the acknowledgment, there will be but frail security to titles; for if such evidence is to prevail in one case, it must prevail in all cases; and whenever a woman can be found, and they are numerous, to swear against her own act, there is really no security in titles, derived in whole or in part from them.

If this claim is allowed, then the titles of the State are in the most imminent danger, for the wife can destroy her act in every case, and nullify the certificate of the officer whenever her interest or cupidity, or other motive, may prompt her to make the experiment. Indeed, it will be no longer an experiment, for if the decree in this case is sanctioned, it will become a precedent.

We are satisfied, the acknowledgment being in proper form, and the wife fully informed, her right of dower and homestead was released. The officer sufficiently explained to her the effect of the mortgage, and she replied she understood it.

This question came before this court in an action of eject-

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ment, in which the premises sued for were claimed as a homestead, and in which it was contended the homestead had not been released by the wife. The question was, did the wife release her homestead?

Her acknowledgment of the fact was certified by the magistrate, in the usual form, and he testified to it on the trial. Other witnesses testified they were present when the acknowledgment was taken, and in a position to hear all that was said, and heard no such acknowledgment. The jury gave to the testimony of the magistrate the greatest weight, and found—and, as we thought, correctly—that the wife had relinquished her homestead right. In the opinion delivered in that case it was said, “ But another more important question remains, and that is, in the absence of fraud or imposition in proving the execution of a deed by a wife, is parol evidence admissible in an action of ejectment to impeach the certificate? We have examined the authorities on this point, and we think where the certificate of the privy examination of a married woman is in the form required by the statute, it is not sufficient, in order to impeach it, to allege that there was no private examination; that she did not acknowledge the deed as her act and deed; that she did not release her homestead right. There must be some allegation of fraud or imposition practiced toward her; some fraudulent combination between the parties interested and the officer taking the acknowledgment. The certificate of the officer as to the acknowledgment must be judged of solely by what appears on the face of the certificate; and if that is in substantial compliance with the statute, it ought not to be impeached except for fraud and imposition.” *Graham v. Anderson*, 42 Ill. 514.

Testing this case by these principles, as they apply as well to this suit as to an action of ejectment, the certificate of acknowledgment should have prevailed, there being no proof, or pretense, even, of fraud and imposition practiced upon appellee, or any fraudulent combination of the grantee with the officer taking the acknowledgment; nothing of this kind is shown.

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

FRANKLIN OLIVER

v.

THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY.

1. INCOMPLETE SALE OF LAND—*waiver of rights by purchaser.* A seller makes an offer, and the purchaser accepts and pays the price; but, before receiving deed, he takes back his money, and takes under a contract to pay at a future day, and upon conditions: *Held*, that he thereby waives any equitable rights growing out of the original transaction.

2. CONTRACT—*time being of the essence of it—when forfeited.* A contract in the usual form of a forfeit bond, in which conditions precedent are imposed upon the purchaser, wherein time is of the essence of the contract, and the right to declare a forfeiture is reserved, upon non-performance by the purchaser, may be disregarded and the property resold to another.

3. Such contract has none of the elements of a mortgage, and the delinquent can have no standing in a court of equity.

APPEAL from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WILLIAMS & BURR, for the appellant.

Mr. A. E. HARDING, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a bill in equity, exhibited by the appellant against the appellees in the circuit court of Livingston County, to compel the conveyance of certain real estate. The venue was

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subsequently changed to the county of McLean, where the cause was heard, and the bill dismissed for want of equity.

The principal facts in the case are as follows: the United States granted certain swamp lands to the State of Illinois, and the State afterward granted them to the various counties in which they were situated. The appellant made application to the board of supervisors on the 9th day of December, 1857, to purchase certain tracts of the swamp lands.

On that day, the board of supervisors made the following order: "Ordered that the county judge sell to Franklin Oliver, at their appraised value, the following swamp and overflowed lands," describing certain lands, and, among others, the forty acres now in controversy.

On the 6th day of January, 1858, the appellant went to Henry Jones, the county judge, to complete the purchase, and gave to him the full amount of the purchase money in gold, and asked for a deed. Jones did not make the deed, and some days afterward told appellant that he could not make the deed, for the reason, as the appellees say, that the title to the swamp lands had not then been confirmed to the State by the Government, and that there was some difficulty about the title. But the appellant says that the county judge placed his refusal to make a deed on the ground that he had no blank form, and could not make one. It is a matter of no consequence for what reason the county judge refused to make the deed. The appellant further states that the county judge then advised him to borrow the money paid for the land, from the county; and thereupon, he took back the money and accepted the contract set out in the bill, which is a contract in the usual form of a forfeit bond, making time of the essence of the contract, and requiring a certain amount of cultivation and drainage to be done on the land. The appellant did not promptly make all the payments of the interest and principal, as the same became due, and on the 27th day of January, 1865, the commissioner, on behalf of the county, conveyed to one Cushman, the forty acres now in controversy. When the appellant discovered that the commissioner had executed a deed to Cushman, he imme-

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diately tendered the money due upon the contract for the land, and has ever since kept the tender good.

It is not claimed, on behalf of the appellant, that he ever complied with the conditions of the written contract executed by the county judge on behalf of the county, and delivered to and accepted by him. Relief is sought mainly on two grounds: first, that the contract is nothing more than a mortgage to secure, as is alleged, the money borrowed by appellant from the county judge, after he had paid it to him for the land; and, second, that the county judge had no authority to put into the bond or contract the conditions of forfeiture, and requiring cultivation and drainage; and, therefore, such conditions are without any validity in law or equity, and are not binding on the appellant.

We do not think that this transaction will bear the construction given to it by the counsel for appellant. No elements of a mortgage are to be found in the contract, and the facts in the case are inconsistent with any such theory. Previous to the execution of the contract by the agent of the county, the appellant had no equitable or legal title to the land, and, therefore, he had no interest which could be mortgaged. All the interest that he ever had or could possibly acquire in the estate, was under the contract, and by a strict compliance with its terms.

In view of the facts, we must regard the appellant as having voluntarily, on the advice perhaps of the county judge, taken back his money, and purchased the land on the terms and conditions named in the written agreement. Having thus elected to purchase the lands, with a full knowledge of all the facts, on the terms stated in the agreement, no reason is perceived why the conditions therein contained were not obligatory upon him. They were the terms upon which the county was willing to part with its title; and if appellant was unwilling to comply with them, it was his privilege to refuse to accept the contract.

It is not controverted that appellant accepted the written contract, and he must, therefore, be regarded as having purchased the land on the conditions named; and before he can

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have any relief in a court of equity, he must show, by proof, that he complied with those conditions, or some sufficient reason for the omission. *The Board of Supervisors of Livingston Co. v. Henneberry*, 41 Ills. 179.

It is insisted, that if the conditions of the written contract were ever binding on appellant, those conditions were waived by the county, by the order made by the board of supervisors on the 17th of September, 1858; and having once waived the conditions of forfeiture, the county can not, at any subsequent period, enforce them, or avail of them as a defense. It is not necessary to determine in this controversy what was, or what was intended to be, waived by that order, for the reason that, by no fair construction that can be given to it, was the prompt payment of principal and interest to become due for the purchase money of this class of lands waived. These were material conditions, and the appellant, having failed to pay for the land according to the terms of the contract, and having shown no reason for his failure so to do, the county had the clear right to declare the contract forfeited, and to sell the land to whomsoever would purchase. By the agreement of the parties, time was made of the essence of the contract, and if the appellant desired to secure any rights under it, he should have complied with its terms, or procured an extension of time from the proper authorities. This he did not do, but suffered a long period to elapse without paying the interest or principal after the same became due, and has shown no excuse whatever for his non-compliance with the terms of the contract.

Under the facts in this case, the appellant can have no standing in a court of equity, and the bill was properly dismissed, and the decree is affirmed.

Decree affirmed.

Syllabus.

JOHN S. MEDLEY *et al.*

v.

WILLIAM ELLIOTT *et al.*

1. **LIMITATION—foreclosure.** The grantees of a mortgagor are not protected in their title against a foreclosure of the mortgage duly recorded, by seven years possession and payment of taxes under the first section of the limitation law of 1839.

2. **SAME.** From the peculiar relation of mortgagor and mortgagee, and the fact that a purchaser from the former succeeds only to his rights, with notice of the incumbrance, and the consequent privity between the parties, the possession of such purchaser must be considered as in subordination to the mortgage, and not hostile; and it can not cease to be of that character until there is an open disclaimer of holding under it, and the assertion of a distinct title with the knowledge of the mortgagee.

3. **SAME—character of possession.** The possession required under the limitation law of 1839 must be adverse. It must be hostile in its inception, and so continue. It must be an actual, continued, visible, notorious, distinct, and hostile possession.

4. **SAME—mortgage.** The statute of limitations which bars the debt can alone bar the mortgage. Until the statutory bar of the debt is complete, an action of ejectment can be maintained, or the mortgage foreclosed by bill in chancery, or by *scire facias*.

5. **MORTGAGE—whose duty to pay taxes.** It is the duty of the mortgagor, or his grantee, when in possession, to pay the taxes on the mortgaged premises; and he can acquire no rights by the discharge of such duty. The mortgagee may well regard such payment as a protection of his interest.

6. **SAME—interest of mortgagee.** In equity, the mortgagee's interest in the mortgaged premises is of a personal character similar to his interest in the debt secured. It is a mere chattel interest. The mortgage is only a charge upon land, and until foreclosure, or possession taken, it remains in the light of a *chose in action*. It is but an incident attached to a debt.

7. **SAME—assignee of mortgage.** The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond.

8. **MORTGAGOR'S INTEREST.** In equity, the mortgagor is the owner of the fee until entry for condition broken, or foreclosure. His relation to the mortgagee is peculiar. He has been termed a tenant from year to year, or at sufferance, or a *quasi* tenant at sufferance, or a tenant at will. While in

Syllabus. Opinion of the Court.

possession he can not be regarded as a trespasser, without some act on the part of the mortgagee.

9. INTEREST OF GRANTEE OF MORTGAGOR. The mortgagor, while in possession, may rightfully sell or lease the premises. His grantee succeeds to his estate, occupies his position, takes subject to the incumbrance, and is subject to the same equities. His possession is not hostile to, or inconsistent with, the rights of the mortgagee, and he is not a trespasser; but the mortgagee, at pleasure, upon forfeiture of the condition, may treat either the mortgagor or his assignee in possession as tenant or trespasser.

10. MORTGAGE—*release of part*. A purchaser of part of the mortgaged premises from the mortgagor, after the release of all the rest of the premises, takes with the lien upon his land exclusively.

11. PARTIES IN CHANCERY—*foreclosure*. Where the mortgagor, in his life time, has sold and conveyed the mortgaged premises, his heirs are not necessary parties to a bill to foreclose the mortgage, they having no interest in the land to be affected.

APPEAL from the Circuit Court of Fulton County; the Hon. C. L. HIGBEE, Judge, presiding.

Mr. S. CORNING JUDD, for the appellants.

Mr. J. S. WINTER, for the appellees.

Mr. JUSTICE THORNTON delivered the opinion of the Court:

The principal question presented by this record is, are the grantees of a mortgagor protected in their title by possession and payment of taxes, under the first section of the limitation law of 1839; and is the mortgagee thereby barred of foreclosure?

It is the settled law, that in equity a mortgagee has an interest in the premises mortgaged of a personal character similar to the interest which he has in the debt secured. The debt is the principal thing, and the land the incident. The mortgage is only a charge upon the land, and the interest of the mortgagee is a mere chattel interest. *Martin v. Mowlin*, 2 Burr. 969; *Pollock v. Maison*, 41 Ill. 516; *Runyan v. Mer-*

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screau, 11 Johns. 534; *Hughes v. Edwards*, 9 Wheaton, 489; *Eaton v. Whiting*, 3 Pick. 484; *Wilson v. Troup*, 2 Cow. 195.

Chancellor Kent said, in *Jackson v. Willard*, 4 Johns. 40, "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt, and in reason and propriety, it can not, and ought not, to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond."

It naturally follows, that the statute of limitations which bars the debt, the principal, can alone bar the mortgage, the incident. The note secured by the mortgage was not barred for sixteen years after maturity; the possession set up, was only for eleven years. It was held in *Pollock v. Maison*, *supra*, that an action of ejectment could be maintained, or a bill of foreclosure filed, or judgment recovered by *scire facias*, until the statutory bar of the debt was complete. It is also decided in *Harris v. Mills*, 28 Ill. 44, that when recovery upon the note is barred, the right of foreclosure is also barred. The converse must be equally true.

Besides, the grantee of the mortgagor only succeeded to the estate of the latter. He occupied his position, and took the land subject to the incumbrance of the mortgage. The mortgagor is the owner of the fee until the exercise of the right of entry for condition broken, or until foreclosure. There is a peculiar relation existing between the mortgagor and mortgagee. The former has been termed, while he retained possession, a tenant from year to year, or at sufferance, or a *quasi* tenant at sufferance, or a tenant at will. 4 Kent, 156; 1 Hill. Mort. 119; *Partridge v. Bere*, 5 B. & Al. 604.

The mortgagor, while he is permitted to remain in possession, may sell or lease the premises, and under such circumstances can not be regarded as a trespasser without some act on the part of the mortgagee. Neither is the assignee of the mortgagor a trespasser in possession. He is a purchaser, with con-

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structive notice of the rights of the mortgagee; occupies the same position as his grantor; and is subject to the same equities. Either may be treated as tenant or trespasser, upon forfeiture of the condition of the mortgage, at the pleasure of the mortgagee. *Dunn v. Rogers*, 43 Ill. 260; 1 Hill. on Mort. 123; 4 Kent Com. 157; *Hughes v. Edwards*, 9 Wheaton, 489; *Doe v. Maisey*, 8 B. & Cress. 767.

The grantees of the mortgagor were never treated as trespassers, and their possession was not hostile to, or inconsistent with, the right of the mortgagee. *Partridge v. Bere*, *supra*; *Hitchman v. Walton*, 4 M. & W. 409; *Doe v. Barton*, 11 Ald. & Ell. 307.

There can be no doubt, that before protection can be afforded, under the limitation law of 1839, the possession must be adverse. It must be hostile in its inception, and so continue. It must be actual, continued, visible, notorious, distinct, and hostile possession. *Hawk v. Senseman*, 6 Ser. & Rawle, 21; *McClellan v. Kellogg*, 17 Ill. 503; *Cook v. Norton*, 48 Ill. 20.

The relation of mortgagor and mortgagee; the fact that the purchaser only succeeded to the rights of the former, and with notice of the incumbrance, and the consequent privity between the parties, forbid the conclusion of an adverse possession. The possession must be regarded as in subordination to the mortgage; and it can not cease to be of that character until there is an open disclaimer of holding under it, and the assertion of a distinct title, with the knowledge of the mortgagee. *Brown v. Devine*, 61 Ill. 260; *Geller's Lessee v. Eckert*, 4 How. U. S. 289.

The case of *Manning v. Warren*, 17 Ill. 267, differs from the present in an important particular. The entry, in that case, was under a deed executed by the mortgagor prior to the execution of the mortgage, and, hence, the possession could not be said, with any propriety, to be subservient to the mortgage.

As to the payment of taxes, it was the duty of the mortgagor, as well as his grantees, while in possession, to pay the

Opinion of the Court.

taxes, and no right could be acquired thereby. The mortgagee might well regard such payment as a protection of his interest. *Wright v. Langley*, 36 Ill. 381.

We are of opinion that the record shows a release of all the mortgaged premises, except the land conveyed to appellants, and that the mortgage lien rested upon it. The releases were executed prior to the conveyance to appellants.

The heirs of the mortgagor were not necessary parties, as all the premises mortgaged had been sold and conveyed, and, therefore, they had no subsisting interest in the land.

We think that the decree should be affirmed.

Decree affirmed.

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ABANDONMENT.

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ABATEMENT.

NON-JOINDER OF SECRET PARTNER.

1. In an action of assumpsit to recover the value of services rendered, the defendant pleaded in abatement the non-joinder of his alleged partner: *Held*, that proof showing there was such a partner, but that he was a secret partner, and of whom the plaintiff had no knowledge at the time he was employed by the defendant, would not support the plea. *Goggin v. O'Donnell*, 66.

ASSESSMENT OF DAMAGES.

2. *When issue is found against the defendant, whether jury should assess them.* Where a plaintiff takes issue on a plea in abatement, and the jury find against the defendant, they should assess the plaintiff's damages so that final judgment may be given. It is not necessary to swear the jury specifically to assess the damages, but swearing them to well and truly try the issue joined between the parties, and a true verdict render according to the evidence, includes the assessing of the damages. *Ibid.* 66.

DEATH OF A SOLE PLAINTIFF IN EJECTMENT.

3. *Revivor in the names of a part of the heirs.* See EJECTMENT, 1, 2.

ACKNOWLEDGMENT OF DEEDS.

IMPEACHMENT BY PAROL.

1. Where the certificate of acknowledgment of a mortgage in due form shows that the wife relinquished her dower and homestead right, in the absence of fraud or imposition upon the wife, or combination between the mortgagee and the officer taking the acknowledgment, she will not be allowed to show in defense of a bill to foreclose that she did not in fact relinquish her dower and homestead right. *Monroe v. Poorman et al.* 523.

2. Where the certificate of the acknowledgment of a deed is in conformity to law, it can only be impeached for fraud or imposition. The certificate must be judged of by what appears upon its face. There

ACKNOWLEDGMENT OF DEEDS. IMPEACHMENT BY PAROL. *Continued.*

fore, proof negating the necessary facts shown therein, will not alone be sufficient to impeach the certificate. *Monroe v. Poorman et al.* 523.

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3. An objection that a deed admitted in evidence was defectively acknowledged will be obviated by proof of its execution. *Hobson et al. v. Ewan*, 146.

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1. When the plaintiff performs work for a defendant under a contract to give a certain time for the payment of the price, upon condition that defendant will give his note bearing a certain rate of interest on the completion of the work, which he refuses to do, the price will become due upon the completion of the work, and suit may be brought before the expiration of the proposed credit. *Van Horn et al. v. Burroughs et al.* 388.

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ADMINISTRATION OF ESTATES.

GRANTING LETTERS OF ADMINISTRATION.

1. *Premunption as to jurisdiction—questioning the proceedings collaterally.* In an action of ejectment, a sale of land by an administrator was claimed to be void on the ground that the intestate died in the State of Kentucky, and that the administrator appointed was neither a relative nor creditor, and not interested in the estate, and consequently letters could only be granted to the public administrator: *Held*, that this objection could not be raised in a collateral proceeding. *Hobson et al. v. Ewan*, 146.

2. The county court being invested with complete jurisdiction of the subject of granting administration on the estate of deceased persons, its action in a case properly brought before it, however erroneous it may be, must be regarded as valid and binding in every collateral proceeding until reversed. And where that court granted administration on the estate of one who died intestate, and was a non-resident, it will be presumed, in all collateral proceedings, that it had satisfactory evidence before it to justify its action. *Ibid.* 146.

SALE OF LAND TO PAY DEBTS.

3. *Notice of application.* The following notice was given of the presentation of a petition of an administrator for an order to sell land to pay the debts of his intestate, to-wit: "To all persons interested: Take

ADMINISTRATION OF ESTATES. SALE OF LAND TO PAY DEBTS.
Continued.

notice, that I intend to present a petition to the circuit court at its next term, to be holden in Monmouth, in the county of Warren, and State of Illinois, on the third Monday of October, A. D. 1853, praying said court for an order to sell all of the real estate belonging to the estate of Bushnell Willey, deceased, for the purpose of paying the debts against said estate." It was signed by the administrator, and dated Monmouth, Ill., August 2, 1853, and published for the time required by the statute: *Held*, that the notice was sufficient to give the court jurisdiction. *Hobson et al. v. Ewan*, 146.

4. Under the statute in force in 1853, the administrator had the choice of two modes by which to bring the heirs into court, the one by serving a notice, with a copy of the account and petition, on each of the heirs or their guardian, and the other by publishing a notice, to all parties interested, in the nearest newspaper. Either mode was sufficient to bring the heirs and all interested parties into court, and thus give the court jurisdiction of their persons, and in neither was it necessary to state the names of the heirs, or other interested parties, in the notice. *Ibid.* 146.

5. An administrator's sale of real estate, under an order of court, was attacked on the trial of an action of ejectment on the ground that the notice of the application was, that he would apply for an order to sell *all* the lands of the intestate, instead of "the whole, or so much thereof as will be sufficient to pay his debts:" *Held*, that as the statute prescribed no particular form of notice, and as the notice itself fully apprised all parties interested of the nature of the application, and the time and place when and where it would be made, the objection was not tenable. *Ibid.* 146.

6. So, also, when such notice was directed "to all persons interested," an objection that the notice did not request all persons interested in the estate to show cause why the land should not be sold to pay debts, was considered without force. The same strictness required in applications to sell lands for delinquent taxes does not apply in proceedings of this kind. *Ibid.* 146.

7. *Finding as to notice.* When the circuit court, on the petition of an administrator for an order to sell the lands of his intestate to pay the debts of the estate, finds in its decree that due notice of the application had been given by publication, it is at least *prima facie* evidence that the notice required by law had been given. *Ibid.* 146.

8. *Of the petition.* Although the statute required the administrator to state in his petition for an order to sell real estate to pay debts "what real estate the testator or intestate died seized of, or so much thereof as will be necessary to pay his or her debts," yet when a petition, after stating that there remained no personal assets, and the ex-

ADMINISTRATION OF ESTATES. SALE OF LAND TO PAY DEBTS.
Continued.

istence of a large indebtedness, concluded in these words: "That to pay the debts there only remained the real estate belonging to the estate," describing it: *Held*, that the statement was equivalent to a technical allegation of seizin, and was sufficient. *Hobson et al. v. Evan*, 146.

9. It is no objection that the names of the heirs are not stated in such a petition. Such omission will not invalidate the decree of sale. *Ibid.* 146.

10. It was objected in a collateral proceeding involving the question of title, that an administrator's petition for leave to sell lands of his intestate was addressed: "To the Hon. H. M. Wead, Judge of the Tenth Judicial Circuit, in chancery sitting," or to the equitable jurisdiction of the court: *Held*, that the petition was not addressed to the chancery side of the court, but to the judge; and that as no form was prescribed, if it contained the substantial requirements of the statute it was sufficient, and would be considered as presented and carried on under the statute. *Ibid.* 146.

11. *Filing account of personalty.* Where the administrator's petition for a decree to sell real estate avers that there was no personal estate, an objection that no account or inventory of the personal estate and debts was filed, is untenable. *Ibid.* 146.

12. *Proof of indebtedness.* In this case the only evidence before the circuit court of the existence of indebtedness against the estate, was a record from the county court of H. County, Ky., but the same had not been allowed by the county court in the county granting administration in this State. It was held, that if this were conceded to be error, yet it could not affect the jurisdiction of the court, and that the sale under the decree could not be questioned for such error in a collateral proceeding. *Ibid.* 146.

13. *Confirmation of sale.* The statute in force in 1853, regulating sales of real estate by administrators, did not require that the court should confirm a sale made under its order. *Ibid.* 146.

14. *Seizin—ownership—construction of the statute.* The word "seized," in sec. 103 of chap. of Wills, R. S. 1845, as used in reference to the lands of deceased persons, construed to mean possessed or owned. In this section and section 125, seizin and ownership are used as synonymous. *Ibid.* 146.

ADMINISTRATOR'S DEED TO AN ASSIGNEE.

15. On the trial of an action of ejectment, an administrator's deed was objected to, because it was not made to the purchaser at the sale, but to his assignee: *Held*, that this objection could not be made by the heirs of the intestate or those claiming under them. The title claimed by them was divested by the sale, and they had no interest

ADMINISTRATION OF ESTATES. ADMINISTRATOR'S DEED TO AN ASSIGNEE. *Continued.*

in the question whether the purchaser or his assignee was entitled to the conveyance. *Hobson et al. v. Ewan*, 146.

ADMISSIONS. See EVIDENCE, 11, 12, 13.

AGENCY.**WHETHER AN AGENCY CONTINUES TO EXIST.**

1. *Notwithstanding the form of a sale to the agent.* Where a person holding a note, secured by mortgage, to be sold by him as agent for his principal at not less than a given sum, took an absolute assignment of the same to himself for the price named, for which he gave his principal credit on his books, and afterward sold the same at an advanced price, professing to be acting as agent, and stating to the purchaser that he had just obtained the consent of his principal to make the sale: *Held*, that these facts showed that at the time of the sale, he was still acting as agent, notwithstanding the absolute assignment to him. *Mason, Ex'or, et al. v. Bauman*, 76.

PURCHASE BY AGENT FROM PRINCIPAL.

2. *Fraudulent concealment.* Where an agent holding a note and mortgage for sale was offered \$4,800 therefor, afterward purchased the same of his principal for \$4,500, without disclosing the offer he had: *Held*, that if the agent at the time of his purchase failed to disclose important facts to his principal, he failed to acquire a complete title, and was bound to account to his principal for whatever sum he realized out of the sale of the note and mortgage. *Ibid.* 76.

3. While it is true that the principal is bound by the fraudulent acts of his agent perpetrated on third persons while acting under his authority in reference to the subject of his agency, yet a person dealing with the agent is not liable to the principal for the acts of the agent in fraud of the rights of the principal, when such person is not himself a party to the fraud. *Ibid.* 76.

EFFECT OF AGENT'S FRAUD ON TITLE OF PURCHASER.

4. Where an agent under a valid power sells and indorses negotiable paper in fraud of the rights of his principal, to *bona fide* purchasers, for a valuable consideration paid without notice that the agent is acting fraudulently toward his principal, and there is nothing on the face of the papers, or circumstances of the case, to put them on inquiry, the purchasers will acquire a title free from all equities existing between the principal and agent. *Ibid.* 76.

5. Where the owner of commercial paper indorsed the same to an agent, in form absolute, to enable him to sell the same in the market, and the paper was fair on its face, not yet due, and nothing to excite suspicion, or put the purchasers on inquiry, it was held that the pur-

AGENCY. EFFECT OF AGENT'S FRAUD ON TITLE OF PURCHASER. Continued.

chasers who paid value therefor, would not be held chargeable with notice that the agent was acting fraudulently merely because the purchasers knew that the seller was acting as agent, or because one of them was a relative of the agent. *Mason, Ex'or, et al. v. Bauman*, 76.

6. Where an agent, in selling negotiable paper for his principal, acted within the scope of his authority, his subsequent fraud in retaining part of the proceeds of the sale from the principal, will not affect the title of the purchaser who buys in good faith. *Ibid.* 76.

WHERE THE AGENT SUBSEQUENTLY ACQUIRES TITLE.

7. *Extent of his liability to his principal.* Where an agent sold a note, secured by mortgage, under an authority from his principal, to a *bona fide* purchaser for a fair price, who took without notice of any equities between the agent and the principal, and who foreclosed the mortgage and acquired title to the mortgaged premises; *Held*, that such purchaser acquired a title free from all the equities existing between the principal and agent; and that the agent, some years afterward, having purchased the same, could hold the same, and that a decree allowing the principal to redeem from the sale was erroneous. *Ibid.* 76.

8. But had the agent fraudulently sold the securities with a view of acquiring title in himself, and employed the purchaser as an instrument to accomplish such purpose, and thereby acquired title to the mortgaged premises, then the fraud, notwithstanding the power of sale, would have followed the property, both in the hands of the purchaser and his own, and his principal would have had a right to redeem. *Ibid.* 76.

9. The owner of a note and mortgage of \$7,500, being embarrassed, indorsed the same to B, a creditor, to sell for the purpose of raising money to meet his liabilities, with directions not to sell for less than \$4,500. B afterward, as the agent, sold the same to *bona fide* purchasers for \$5,000, B having no interest whatever in the purchase. B only accounted for \$4,500, and some interest. The purchasers foreclosed and acquired thereby the title to the mortgaged premises; and about five years and a half after their purchase, sold and conveyed the premises to B for \$7,000. The owner then filed his bill praying to be allowed to redeem, by paying B the amount received from him, with interest, on the ground of fraud on the part of B, which was so decreed. *Held*, that the decree was erroneous in allowing a redemption; but if B had failed to pay over all he received for the note and mortgage, a decree for the unpaid balance in his hands, with interest, would be proper. *Ibid.* 76.

AGENT MUST ACCOUNT FOR ALL HE RECEIVES.

10. Where the owner of a note, secured by mortgage, placed the same in the hands of a creditor, properly indorsed, to be sold in the market

AGENCY. AGENT MUST ACCOUNT FOR ALL HE RECEIVES. *Continued.*

to raise money for the owner's benefit, and finally assigned the same absolutely for \$4,500, for which the agent gave him credit on his books, but shortly afterward, professing to act on behalf of his principal, sold the securities for \$5,000: *Held*, that he was bound to account to his principal for the full amount received by him. *Mason, Ex'or. et al v. Bauman*, 76.

ALLEGATIONS AND PROOFS. See **PLEADING AND EVIDENCE**, 1 to 4.

AMENDMENTS.

POWER OF THE COURT OVER THE RECORD.

During the term. See **JUDGMENTS**, 3, 4.

APPEALS.

APPEAL FROM COMMON PLEAS COURT OF MATTOON.

1. *To the circuit court—manner of trying the same.* The act creating this court gave an appeal to the circuit court of Coles County, in the same cases, to be taken and conducted in the same manner as appeals from the circuit to the supreme court, with this proviso, "provided, either party may introduce other and additional evidence upon the trial in the circuit court as in other cases." It was held that a party appealing under this act from a judgment against him, and failing to preserve the evidence heard on the trial in the common pleas court, could not be allowed to introduce evidence on the trial of the appeal. *Indianapolis and St. Louis Railroad Co. v. Miller*, 468.

2. The manifest intention of such act is, that if the objection is to the finding of the jury, the evidence should be preserved in and made a part of the record by a bill of exceptions, and that the case should be tried in the circuit court on the bill of exceptions, and such additional evidence as the parties may introduce. When the evidence is not thus preserved there can be no trial on the evidence heard below, and there is no evidence in the record to which other evidence can be added. *Ibid.* 468.

3. When the evidence is not preserved in the record, the circuit court must try the case on the record alone, and if no error appears therein, the circuit court may either affirm the judgment below and award a *procedendo*, or render final judgment and award an execution the same as this court may do. *Ibid.* 468.

APPEARANCE.

WHEN ENTERED BY AN ATTORNEY.

Presumption of authority. See **ATTORNEY AT LAW**, 1, 2.

APPURTENANCES.

WHETHER THE WORD MUST BE USED.

In a deed. See CONVEYANCES, 3.

ARBITRATIONS AND AWARDS.

CONSTRUCTION OF AN AWARD.

1. *As to interest.* Where an award found a certain sum to be due from one of the parties to the other, and directed its payment as follows: "One thousand dollars to be paid within five days from this date, and the balance (twelve hundred and eighty-four dollars and thirty-two cents) to be paid within sixty days from this date, together with ten per cent interest per annum thereon from this date until paid:" *Held*, that no interest was to be paid on the one thousand dollars, if paid within five days; and that, as the award made no provision for any rate of interest if not so paid, the rate of interest must be governed by the statute, and that no higher rate than six per cent per annum could properly be allowed. *Noyes v. McLaflin*, 474.

INTEREST.

2. *What may be allowed.* Where an arbitrator is empowered to make an award according to the principles of justice, and the award gives sixty days' time for the payment of the principal sum found to be due, it will not be considered as unreasonable, if it also requires the party to pay interest on such sum from the date of the award at the rate of ten per cent per annum. The terms of such a submission are broad enough to authorize such an award. *Ibid.* 474.

OF A NEW ARRANGEMENT.

3. *Waiver.* In case of a submission to arbitration and award, if the parties refuse to abide the award, and make a new arrangement, this will be a waiver of the rights of the parties under the award. *Newlan v. Lombard University*, 195.

ASSESSMENT OF DAMAGES.

ISSUE FOR DEFENDANT ON PLEA IN ABATEMENT.

In what manner damages assessed. See ABATEMENT, 2.

ASSIGNMENT.

SALE OF LAND UNDER EXECUTION.

1. *Assignee of certificate of purchase—whether protected against equities in favor of the judgment debtor.* Where land was sold at sheriff's sale, on execution, under such circumstances that the judgment debtor, in equity, has the right to have the sale set aside as against the purchaser, and the purchaser assigns the certificate of purchase to a party having no notice of the equities of the case, but who does not take it absolutely, but only on condition of its validity, and who has parted with

ASSIGNMENT. SALE OF LAND UNDER EXECUTION. Continued.

nothing for it before bill filed to set aside the sale, such assignee can not set up any equities to defeat the bill. *Coggeshall et al. v. Ruggles*, 401.

ASSIGNMENT OF A MORTGAGE.

2. A mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. *Medley et al. v. Elliot et al.* 532.

ATTACHMENT.**PUBLICATION OF NOTICE.**

1. *Of the computation of the sixty days' time required by the statute.* In the computation of time under the section of the attachment act, requiring that sixty days shall intervene the first publication of notice and the term of court, the rule is to exclude the day on which the notice is first inserted in the newspaper, and include the day on which the term commences. *Forsyth et al. v. Warren*, 68.

REQUISITES OF THE NOTICE.

2. In an attachment suit, the notice of publication recited a date to the writ subsequent to the return term. Such mistaken and unnecessary date, the notice being otherwise in full compliance with the statute, was not regarded as a fatal defect in the notice. *Ibid.* 68.

JUDGMENT IN ATTACHMENT.

3. *When limited to the amount claimed in the affidavit.* It is a fatal error for the plaintiff in an attachment in which there is no other jurisdiction obtained in the case except by levying the attachment and publishing the notice, to take judgment for more than the sum claimed in the affidavit and notice, with the subsequently accruing interest. *Ibid.* 68.

4. *Waiver of such error.* Nor does the defendant waive such error by coming into court after judgment, though at the same term, and praying an appeal. *Ibid.* 68.

ATTACHMENT OF BOATS AND VESSELS.**THE LIEN—HOW CREATED.**

1. *And whether released by a discharge of the property.* The lien given on boats and vessels for supplies, etc., is not created by the levy of an attachment writ, but by statute, and the levy is but a means furnished to enforce the lien. Therefore, where a tug boat was discharged from attachment by order of the court on the execution of a bond by the owners, as allowed by the statute, and the attachment suit, under which the levy was made, was dismissed by the plaintiff, it was held that the statutory lien was not thereby released, and a plea in a second suit by attachment, of the discharge of the vessel by the giving of bond in the prior suit, was adjudged bad on demurrer. *Tug Boat E. P. Dorr v. Waldron et al.* 221.

ATTACHMENT OF BOATS AND VESSELS. *Continued.*

CHARACTER OF THE LIEN CREATED BY STATUTE.

2. *As distinguished from a maritime lien.* A maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port; and in respect to such contracts, it is competent for the State legislatures to create such liens as they may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations for their enforcement. *Tug Boat E. P. Dorr v. Waldron et al.* 221.

3. The proceedings by attachment given by the statutes of this State against boats and vessels to enforce liens for supplies, etc., have no resemblance to libels in the courts of admiralty, but are of the same character as ordinary suits by attachment, requiring notice to be given of the pendency of the suit; and by them no prior liens are interfered with. They are not proceedings in admiralty such as the district courts of the United States are invested with exclusive jurisdiction over by law. *Ibid.* 221.

CONFLICT OF LAWS.

4. *Jurisdiction of State and Federal courts.* The jurisdiction of the United States district courts on the lakes and navigable waters connecting the same, is governed by the act of Congress of February 3, 1845, and is not exclusive, but is concurrent with such remedies as may be given by State laws. *Ibid.* 221.

OBJECTION AS TO JURISDICTION.

5. *Should be made in court below.* On appeal from the judgment of the Superior Court of Chicago, rendered in a suit by attachment against a vessel for supplies furnished, it was objected that the proceeding failed to show that the court had jurisdiction, and that the affidavit did not show that the supplies were furnished at the home port of the vessel, and that she was a domestic vessel: *Held*, that as the objection was one that might have been obviated by amendment, if made in the court below, it came too late when urged for the first time in this court. *Ibid.* 221.

ATTORNEY AT LAW.

PRESUMPTION AS TO HIS AUTHORITY.

1. When an attorney enters the appearance of a party to a suit, it will be presumed that he had authority; but the presumption is not conclusive, and may be rebutted if done in apt time. *Lealie et al. v. Fischer*, 118.

2. The practice does not require a written retainer, and, as it would be a breach of professional duty in an attorney to enter an appearance without authority, until overcome by proof it will be presumed that it was proper and authorized. *Ibid.* 118.

OF AN ATTORNEY'S LIEN. See LIENS, 1.

BAILMENT.**BURDEN OF PROOF.**

In action by bailor against bailee. See EVIDENCE, 4, 5.

BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS.**BOARD OF PUBLIC WORKS OF CHICAGO.****AWARDING CONTRACTS ON PUBLIC BUILDINGS.**

1. *Whether the courts will control the discretion of the board in that regard.* By the charter of the city of Chicago, the board of public works was made a distinct branch of the city government, having charge and superintendence of all the public improvements of the city, and all contracts were required to be awarded by said board "to the lowest reliable and responsible bidder or bidders." The board advertised for sealed proposals for the construction of a new "lake tunnel," of the estimated cost of \$400,000, reserving the right to reject any bid for certain causes. The contract was awarded to Steele & McMahon, who were not the lowest bidders. The complainants, whose bid was about \$4,000 less, filed their bill in equity to restrain the board and Steel & McMahon from entering into the performance of the contract, and to compel the board to award the contract to complainants; also claiming that, as tax payers, they were entitled to demand the letting of the work to the lowest bidder. The court below dismissed the bill: *Held*, that the decree was right; and that, so far as the bill sought to have the contract awarded to complainants, it was in the nature of a mandamus, and would not lie, as the board was invested with a discretion, which, in the absence of fraud, the courts would not seek to control; that the complainants had no clear legal right to the relief sought; and that the claim of injury as a tax payer was equally inadmissible as a ground for maintaining the bill. *Kelly et al. v. City of Chicago et al.* 279.

BURDEN OF PROOF. See EVIDENCE, 4, 5, 6; WILLS, 23.**CHANCERY.****JURISDICTION IN CHANCERY.**

1. *When there is a remedy at law.* Where one partner borrowed money for his individual use, for which he gave his note, with the other partner as security, and the latter, after a dissolution of the partnership, was compelled to pay the same, after which he filed a bill in equity, to have the sum so paid set off upon a note given by him to his co-partner on the dissolution: *Held*, that the complainant had an adequate remedy at law by an action of assumpsit. *Dovey et al. v. Eckert*, 218.

CHANCERY. Continued.
WHEN A CAUSE MAY BE SET FOR HEARING.

2. It is error to proceed to the hearing of a cause in equity and render a final decree therein at the same term of court at which replication is filed to the answer.* *Beveridge et al. v. Mulford et al.* 177.

3. When one of the defendants to a bill in chancery, being interested in the land sought to be affected by the bill, had answered, and the court proceeded to hear the cause and render final decree at the same term at which replication was filed, both as to the defendant who had answered, and another defendant who had acquired an interest in the land from his co-defendant, there being no evidence of acquiescence, it was held error. The case as to the defendant who had not answered should not have been finally disposed of before the hearing as to his co-defendant. *Ibid.* 177.

BILL TAKEN AS CONFESSED.

4. *Of the proofs.* Where a bill is taken as confessed, the court may, in its discretion, require proof as to any or all the allegations of the bill, or render a decree without proof. And no distinction is made in this respect between bills sworn to and those not sworn to. *Bennesson v. Bill et al.* 408.

REMOVING CLOUD UPON TITLE.

5. *Character of relief which may be given.* On bill to remove a cloud caused by a tax title acquired without service of any notice on the parties in possession, the circuit court decreed that the holder of the tax title convey his title to complainant. There was nothing in the bill showing that there was any contract, trust relation, or other equitable grounds requiring the party to convey his tax title: *Held*, that the decree was erroneous. The proper decree in such case is, to perpetually enjoin the holder of the outstanding title, his heirs and assigns, from asserting the same. *Reed v. Reber et al.* 240.

6. *Defective tax title.* Equity has jurisdiction to entertain a bill to remove a cloud upon title occasioned by an outstanding tax title, when no notice of the sale for taxes, and of the time when the redemption will expire, was served upon the parties in possession before taking out a deed, as required by the constitution. *Ibid.* 240.

7. A court of equity will entertain jurisdiction of a bill by the owner of land who is in possession, to remove a cloud upon his title consisting of an illegal tax deed obtained upon it. *Lee v. Ruggles*, 427.

8. *Terms of decree—refunding taxes to defendant.* On bill to set aside a tax deed on complainant's land, on the ground that the taxes for which the land was sold were illegally assessed for drainage purposes, and the

* "After replication is filed, the cause shall be deemed at issue and stand for hearing." *Laws 1872*, p. 334, sec. 29.

CHANCERY. REMOVING CLOUD UPON TITLE. *Continued.*

deed was a cloud upon the title, it was objected that the bill should have offered to refund to the defendant the taxes discharged by him in his purchase: *Held*, that, as it appeared the taxes were illegal, and no charge upon the land, and it did not appear by the bill that any benefit had been bestowed upon the land by drainage, or otherwise, the defendant had no equitable claim to have the taxes paid by him refunded. *Lee v. Ruggles*, 427.

SETTING ASIDE SHERIFF'S SALE.

9. *Of the terms imposed.* In 1855, A, as principal, and B, as surety, executed a note for three hundred dollars. In 1857, the surety becoming doubtful of the solvency of A, purchased of the latter a pair of horses and a buggy for four hundred and twenty-five dollars, and agreed to pay three hundred dollars of the price upon the note, which he failed to do. In 1861, judgment was recovered on the note against both, which judgment was transferred to one Beasley, who, being indebted to A for corn to the amount of four hundred or four hundred and fifty dollars, agreed with A to apply this debt in payment of the judgment, and the judgment was left unsatisfied for the benefit of A. About six months afterward, Beasley had the lands of B sold on execution, under the judgment, and received a certificate of purchase, which he assigned to a son of A, without any new consideration. B filed a bill to set aside the sale, on the ground that the judgment was satisfied before the sale, and only kept in apparent life for the purpose of selling his property. The court below set aside the sale on that ground: *Held*, on appeal, that A, by the arrangement with Beasley, would, in equity, be regarded as having paid the judgment, except so far as it would be just to allow him to hold the certificate of sale as a security for the money paid by him, which B ought to have paid; that the sale should be set aside upon terms requiring B to do equity by paying the amount due from him on the judgment. *Coggeshall et al. v. Ruggles*, 401.

OF AN EQUITABLE MORTGAGE.

10. Where the vendor of land, after the sale, loans the vendee money, taking back an assignment of the contract to secure its repayment, with an agreement that it shall be forfeited if the money is not repaid when due, the transaction will be regarded as an equitable mortgage. *Fitchugh et al. v. Smith*, 486.

FAILURE OF A DEFENDANT TO ANSWER.

11. *Effect upon his rights.* Where the holder of such mortgage, who is also vendor, is made a party defendant in a petition by creditors of the vendee seeking to establish a lien against the premises embraced in the contract as against the vendee, the petition alleging that the vendee holds the land under a contract of purchase from the vendor, and he fails to answer and disclose his rights as such mortgagee, but suffers such creditors to take a decree for the sale of the vendee's in-

CHANCERY. FAILURE OF A DEFENDANT TO ANSWER. *Continued.*

terest, and become purchasers at the sale without notice of his secret lien, the purchasers will succeed to the interest of the vendee, under the original contract of purchase, fully discharged from the lien of the equitable mortgage. *Fitzhugh et al. v. Smith*, 486.

12. Where a petition to enforce a lien for materials furnished in the erection of a building is filed against the vendee and vendor of land, which alleges that the former holds the premises under a contract of purchase from the latter, and the vendor fails to answer, and a decree is taken and the land sold to the petitioners, this will not prejudice the vendor's right to require payment of the purchase money and interest before parting with the title. But if he has any other claim upon the land, such as an equitable mortgage or secret lien, and fails to disclose it before decree and sale, the purchaser of the land without notice, will take the land discharged of such secret claim or interest. *Ibid.* 486.

CREDITOR'S BILL.

13. *No effort to collect at law.* A party having paid a debt as security for another, filed his bill in equity, alleging that his debtor had left the State, taking with him all his effects; that he had sold all his real estate and conveyed certain city lots to his son, who had conveyed to his mother, and that these conveyances were made without consideration, and for the purpose of defrauding complainant and other creditors. The court found the amount of indebtedness, and decreed it a lien upon the lots, and required the son and mother to convey to the debtor; and directed sale of the lots for the payment of the debt and costs: *Held*, that complainant should first have reduced his demand to judgment before coming into equity to question the disposition of the debtor's property, and subject it to the payment of his debt. *Dewey et al. v. Eckert*, 218.

14. Under the circumstances above stated, the complainant might have proceeded by attachment against the property alleged to have been fraudulently conveyed, obtained his judgment, and then gone into equity to remove the conveyances out of the way of his execution, or to subject the property to sale in satisfaction of his judgment. *Ibid.* 218.

SPECIFIC PERFORMANCE.

15. *When it will be granted.* Where the title of a vendee of land is sold under a valid decree against him, the purchaser, upon receiving a master's deed therefor, succeeds to his position as vendee; and, upon complying with the terms of sale, may maintain a bill against the vendor for specific performance. *Fitzhugh et al. v. Smith*, 486.

16. *Of the character of relief granted.* S sold a lot to H for seven hundred and fifty dollars, on credit, giving a contract for a deed, which was never recorded, reserving the right to declare a forfeiture for non-pay-

CHANCERY. SPECIFIC PERFORMANCE. Continued.

ment, and making time of the essence. The vendee afterward loaned H three hundred dollars, secured by an assignment of the contract, to enable the latter to erect a building upon the lot, in the progress of which H incurred an indebtedness to F and B for materials. They, uniting with other lien holders, filed a petition to establish a lien on the premises, making the vendor and vendee defendants, alleging in the petition that H held the premises under a contract of purchase from S. The latter suffered the petition to be taken as confessed, and a decree and sale followed of the interest of H in the premises; F and B became the purchasers, and received the master's deed. After receiving their deed, they tendered to S eight hundred and eighty-five dollars, and demanded a deed; and, upon his refusal, filed their bill for specific performance. The defendant filed no cross bill, asking for affirmative relief. The circuit court, on the hearing, refused to decree that S should execute a deed to complainants upon their payment of the amount of the purchase money found to be due, with interest, but ordered the premises to be sold, and payment out of the proceeds to be made: first, the amount of the purchase money and interest due to S; secondly, the amount of the original lien of F and B; thirdly, to S the amount of his loan to H, and interest; and, finally, to F and B the amount due the other lien holders, which they had paid at their purchase: *Held*, that the decree was erroneous; that no sale should have been ordered; that the complainants having succeeded to the rights of the original vendee, were not entitled to such relief, and that the vendor was not entitled to any affirmative relief; that the complainants were not bound to pay S the sum loaned by him to H; that the proper decree was to require the complainants to pay the amount due upon the contract of sale, with interest, in specie, the contract providing for its payment in gold or its equivalent, within thirty days after entering the decree, and that the master in chancery pay the same over to S upon his executing a proper deed. *Fitzhugh et al. v. Smith*, 486.

17. *Tender—whether necessary.* Where the complainants in a bill for specific performance have succeeded to the rights of the original vendee, by purchase at a judicial sale, and the vendee's contract of purchase has not been recorded so as to give notice of its terms, it will not be necessary for the complainants, before filing their bill, to make a formal tender of the precise sum due the vendor. It will be sufficient if they offer to perform the contract when the vendor declines to recognize their right to a deed unless they pay him money which he had loaned the vendee. *Ibid.* 486.

18. *Of the character of funds in which payment must be made.* Where, by the terms of a contract for the sale of land, the purchase money is made payable, with interest, in specie funds, on bill for specific performance against the vendor, the decree, if for the complainants, must require them to pay in specie the sum due on the contract. *Ibid.* 486.

19. *Party not chargeable with laches.* A purchased three eighty-acre

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

tracts of land and a lot of two acres; and afterward being unable to pay, reconveyed to B, his grantor, two of the eighty-acre tracts, and it was contended that he intended also to include in this conveyance the two-acre tract. He never paid the taxes afterward on it; but about six years afterward, by a verbal contract, sold it to C for \$40, to be paid in rails. C took possession and built a house on it, and improved the same, and offered to make payment, and demanded a deed. A then informed him that the title was in B, and told him he must go to the latter for a deed, which he did, and took a bond for a deed. He then sold his interest to D, who sold to E. After this, A filed a bill against E to enjoin the removal of the building, and E filed a cross bill to reform the deed from A to B, by inserting therein the premises in dispute, and subsequently amended his bill, praying for specific performance of the verbal contract of sale to C, which was decreed by the circuit court upon payment of the purchase money due: *Held*, that the decree was proper, and that the conduct of A, in sending C to B for a deed, relieved C of all charge of laches, in abandoning his contract with A, and that E, under the circumstances, was not chargeable with laches. *Hamilton v. Rook*, 139.

RESCISION OF CONTRACT FOR FRAUD.

20. *General rule.* On the principles of equity and justice, a contract to be obligatory must be justly and fairly made. The contracting parties are bound to deal honestly and act in good faith with each other. There should be a reciprocity of candor and fairness. *Mitchell et al. v. McDougall*, 498.

21. *False representations.* A false representation by the vendor which influences the conduct of the other party, and induces him to make the purchase, will vitiate and avoid the contract. And in making the representation it is immaterial whether he knows it to be false or not, for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury. *Ibid.* 498.

22. *Suppressio veri.* The undue concealment, which amounts to a fraud, for which a court of equity will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientia*, but *juris et de jure* to know. Under such circumstances the concealment of an important fact would be improper and unjust; it would be an undue concealment on account of the fiduciary relation existing; but where the parties, in the absence of any such relation, are treating for an estate, and the purchaser knows from surface indications, or otherwise, there is a valuable mine upon the land, he is not bound to disclose that fact to the owner; for the means of information on the subject are as accessible to

CHANCERY. RESCISSION OF CONTRACT FOR FRAUD. *Continued.*

the one as to the other. The concealment of facts of which the other party is ignorant, must be by a party who is under some special obligation, by confidence reposed, or otherwise, to communicate them truly and fairly, to justify a court of equity in taking cognizance. *Mitchell et al. v. McDougall*, 498.

23. *Suggestio falsi*. In this case the plaintiff and defendant made an exchange of property, the plaintiff conveying to defendant a lot and residence in the city of Bloomington, which he valued at five thousand five hundred dollars, for one hundred and sixty acres of land, and a lot and a half in the town of Montevallo, all in Missouri, which was conveyed by defendant to plaintiff. The defendant assumed an incumbance of one thousand dollars on the Bloomington property, and gave his note for three hundred dollars, difference in the exchange. The plaintiff had never seen the Missouri property, while defendant was well acquainted with it. Plaintiff was induced to make the exchange solely upon the representations of defendant that the land was good land, and the same occupied by Judge Smith before the rebellion, and improved by him; that the land was worth twenty dollars an acre; and that there was a house a story and a half high on the lots, worth one thousand dollars, which was a desirable residence, renting for eight dollars per month. The land conveyed was not the Smith farm; was stony, poorly timbered, and comparatively worthless, and had been purchased by defendant a short time before for four dollars an acre. The Smith farm was worth probably fifteen dollars an acre. The house in Montevallo proved to be a mere shell, one story high, occupied by hogs and goats, unfit for human abode, and not worth over two hundred and fifty dollars. As soon as plaintiff discovered the facts, he demanded of defendant a rescission of the contract and a reconveyance of his property, and made a tender of deed for Missouri property and defendant's note of three hundred dollars. On refusal, he filed his bill for rescission, and pending the suit the house was burned, the defendant having insured same at three thousand dollars. The circuit court dismissed the bill: *Held*, that the court erred in dismissing the bill on the facts of the case; and that as the plaintiff made the contract wholly on the representations of defendant, which proved to be untrue, and did not receive the property he contracted for, he was entitled to have the contract rescinded. *Ibid*. 498.

24. *Mistake—not to be corrected in such case*. In such case the defendant admitted there was a mistake in his conveyance of the Missouri land in not describing the Smith land, and offered to correct his deed so as to convey in fact the Smith farm, and insisted that a mistake in his conveyance was no ground of rescission; but it was held, in view of the fraud practiced upon the plaintiff, it would be unjust to allow the defendant to correct the mistake, and thus retain the contract as made; and that, under the circumstances of the case, the

CHANCERY. RESCISSION OF CONTRACT FOR FRAUD. *Continued.*

plaintiff had a right to take advantage of such mistake and repudiate the entire contract. *Mitchell et al. v. McDougall*, 498.

25. *As to the relative value of the property exchanged.* On bill filed to set aside a deed given for land in exchange for other lands, on the ground that the contract was induced by false representations of the location, quality, and value of the lands taken in exchange, the defendant offered to prove that the property conveyed by him was equal in value to the property conveyed by the complainant: *Held*, that the proof was irrelevant, the question in such case being whether the complainant received in exchange what he bargained for, and had a right to expect from the representations upon which he relied in ignorance of the facts. *Ibid.* 498.

26. *Disposition of insurance on loss by fire.* Where the purchaser of real estate had made an addition to the buildings thereon, and effected an insurance on the whole, and pending a bill by his grantor to rescind for fraud, the buildings were consumed by fire, when the insurance company was made a party by supplemental bill, it was held that a court of equity, in decreeing a rescission, would place the parties in *status quo* as far as possible; and that, as the insurance money represented the buildings destroyed, it was proper, after deducting the premiums paid by the defendant, and the cost of the addition, to require the company to pay the balance of the insurance money to the complainant. *Ibid.* 498.

27. On bill in chancery to set aside a conveyance of an interest in land, made by the grantor to secure the location of the line of a railroad near such land, on the ground of fraudulent representations of the grantee and others interested with him, to induce the conveyance, the court refused to decide whether, if the fraud were proved, the complainant could have relief, and affirmed a decree dismissing the bill for want of proof of the fraud. *Linder v. Carpenter*, 309.

REFERENCE TO THE MASTER.

28. *In matters of account.* On bill for taking an account between partners where the accounts are complex and intricate, the matter should always be referred to a master, to be examined and reported, in order to a final decree; and where the parties, by stipulation to save expense, seek to impose the labor of the master upon the court, this court will not examine intricate and complicated accounts on appeal, but will affirm the decree of the court below. *Riner v. Touslee*, 266.

29. If the complainant in this class of cases should procure an *ex parte* order for a hearing without a reference, this court would reverse the decree below for want of a reference to the master. *Ibid.* 266.

EXCEPTING TO MASTER'S REPORT.

30. *Of the necessity thereof.* Where a party to a suit in chancery fails to except to the master's report of the sum due him, he will be pre-

CHANCERY. EXCEPTING TO MASTER'S REPORT. *Continued.*

cluded from objecting in this court that there was a greater sum due him than was allowed. *Clark v. Laughlin*, 278.

ENFORCING AN ATTORNEY'S LIEN. See **LIENS**, 1.

CHATTEL MORTGAGES. See **MORTGAGES**, 16, 17.

CLOUD UPON TITLE. See **CHANCERY**, 5 to 8.

COLOR OF TITLE. See **LIMITATIONS**, 3 to 6.

CONFLICT OF LAWS.

DECISIONS OF SUPREME COURT OF U. S.

1. *When binding upon State courts.* The decisions of the Supreme Court of the United States upon questions arising under the Federal Constitution are binding upon this court. *McInhill v. Odell et al.* 169.

ATTACHMENT OF BOATS AND VESSELS.

2. *Of the jurisdiction of State and Federal courts in respect thereto.* See **ATTACHMENT OF BOATS AND VESSELS**, 2, 3, 4.

CONSTRUCTION OF A WILL.

3. *As to a bequest of personalty, and a devise of realty—by what law governed.* See **WILLS**, 25, 26.

CONSIDERATION.

OF ITS SUFFICIENCY.

1. If A owe B and give his order on C for a sum that may come into the hands of C, to his use, and C accept the order, he is liable to B for so much of that sum as shall come to his possession, his acceptance being a promise founded upon a sufficient consideration. *Tuttle v. Ridgeway*, 515.

CONSTITUTIONAL LAW.

OF AN ACT OF THE LEGISLATURE.

1. *Its constitutionality—general rule of construction.* The question of the repugnancy of a law to the constitution is one of great delicacy; and the judiciary, in justice to the rights of a co-ordinate department of the State government, ought not, and will not, declare a law to be void, except, upon the most deliberate and mature consideration, its repugnance to the constitution is clearly manifest to the understanding. *Chicago, Danville & Vincennes Railroad Co. et al. v. Smith*, 268.

2. The judicial department being created under the constitution to construe and administer the law, has nothing to do with the policy or expediency of an act of the legislature. The mere fact that an act may be mischievous in its effects, burdensome upon the people, in conflict with our conceptions of natural right, abstract justice, or pure

CONSTITUTIONAL LAW. OF AN ACT OF THE LEGISLATURE. *Continued.*

morality, or of doubtful propriety, will not justify the courts in holding it to be beyond the scope of legislative authority. *Chicago, Danville & Vincennes Railroad Co. et al. v. Smith*, 268.

3. In the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge; and if there be grave doubt as to the nature of the purpose, that doubt must be solved in favor of the action of the legislature. *Ibid.* 268.

OF THE PASSAGE OF A LAW.

Majority required in receding from an amendment. See **STATUTES**, 1.

EMINENT DOMAIN.

Compensation for taking private property for public use—and what manner to be fixed—Constitution of 1870, and the act of 1852. See **RIGHT OF WAY**, 1 to 8.

TAXATION FOR CORPORATE PURPOSES. See **TAXATION**, 6 to 11.

EQUALITY AND UNIFORMITY IN TAXATION. See same title, 1, 2, 3

EXEMPTION FROM TAXATION.

To what extent allowable. See same title.

DELINQUENT TAXES AND SPECIAL ASSESSMENTS.

By whom the application for judgment and the sale may be made, under constitution of 1870. See **TAXATION**, 13, 14, 15.

MUNICIPAL SUBSCRIPTION.

Prohibition in constitution of 1870—when it went into effect. See **SUBSCRIPTION**, 1.

CURATIVE LEGISLATION.

Whether within the power of the legislature. See **SUBSCRIPTION**, 4; **RAILROADS**, 3, 4.

CONTEMPT.**DISOBEYING A VOID WRIT OF INJUNCTION.**

Is not a contempt. See **INJUNCTIONS**, 1.

CONTRACTS.**CONTRACT AGAINST PUBLIC POLICY.**

1. *To induce the location of a railroad.* A contract made with officers of a railroad company, acting in their individual capacity, to induce them to establish the line of the road at a given point, for the purpose of promoting the private advantage of the contracting parties, is against public policy, as tending to sacrifice the interests of stockholders and of the public, and will not be enforced in equity. *Linder v. Carpenter*, 309.

CONTRACTS. *Continued.*

OF A NEW CONTRACT WITH A THIRD PARTY.

2. *Whether it will operate to discharge liability incurred under former contract.* The defendant, by a verbal contract, chartered a vessel to plaintiffs for the season, guaranteeing that her boiler was in good condition, and delivered possession. On inspection the boiler was found to be in an unsound condition, and needing extensive repairs. Defendant's agent directed plaintiff to make the necessary repairs, telling them that it would be all right. After the repairs were made, involving a considerable expense and damage for wages paid employees, who were idle during the repairing, the plaintiffs applied for a written charter-party, and were informed by defendant that he was not the owner of the vessel. While the repairs were being made, defendant chartered the vessel for the season to a railroad company. The owner refused to charter her to plaintiffs, unless they would accept the charter which defendant had made to the railroad company, and perform defendant's part of that agreement. The plaintiffs then took such charter, agreeing to perform defendant's contract with the railroad company, the owner agreeing to allow them one-half of the cost of the repairs: *Held*, that the new contract with the owner did not cancel the defendant's verbal undertaking and release him from liability for damages, except to the extent of the cost of repairs agreed to be paid by the owner. *Webster v. Vogel et al.* 184.

3. It seems when a party has become liable by the violation or breach of a contract made by him in respect to the use of property of which he is not the owner, and the injured party then procures a similar contract from the rightful owner, and in it assumes some of the undertakings of the wrong-doer to still another party, that this will not, by implication, have the effect to dissolve the first contract and release the party making it from his liability for damages. *Ibid.* 184.

SERVICES IN EFFECTING A SALE OF PROPERTY.

4. *And herein of the necessity of notice to the person employed, if his services are to be dispensed with.* Where the plaintiffs are employed by defendants to assist in making a trade in real estate with a promise of a certain compensation in case the same is effected, and do assist in bringing about a trade, they will be entitled to recover the sum agreed to be paid, even though the defendants had changed their proposition, with a view to dispense with plaintiffs' services, when the plaintiffs received no notice of such fact. *Bash et al. v. Hill et al.* 216.

5. When a party engages the services of another, to assist him in making an exchange of property, if he desires to dispense with such services, he should give the other party notice. If he does not, and the service is rendered, he will be required to pay for the same. *Ibid.* 216.

CONTRACTS IN WRITING.

6. *Presumed to contain the whole engagement of the parties.* It is a gen-

CONTRACTS. CONTRACTS IN WRITING. Continued.

eral rule of law that when parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing. In such case to add to it by implication would be to vary its terms and legal effect. *Merchants' Ins. Co. of Chicago v. Morrison*, 242.

REPRESENTATIONS INDUCING SALE.

7. *If incorrect, whether availing.* Where a party purchasing hogs for the market not being aware of the fact that the prices had advanced in Chicago, but relying upon a newspaper report, represented that hogs were on the decline in the market at Chicago, and, in fact, communicated all the information within his knowledge on the subject, and thereby induced the owner of a lot of hogs to agree to sell and deliver them at a certain price per pound: *Held*, that the seller could not refuse to deliver on the ground that the price had advanced instead of declining. *Bird et al. v. Foreman et al.* 212.

CONSTRUCTION OF CONTRACTS.

8. In construing contracts and written agreements, the whole context should be considered, and the intention of the parties ascertained from it, and not from extrinsic evidence. *Stull et al. v. Hance*, 52.

CONTRACTS CONSTRUED.

9. *Procuring enlistments in the military service to enable a town to avoid a draft.* Where a party was employed to procure enlistments in the military service of the United States for the benefit of a town, so as to exempt it from draft in the late civil war, and the party so enlisting was to receive \$400 for each man so enlisted, and credited to the town before the day of the draft: *Held*, that the plaintiff, to recover under such contract, must not only show that he procured an enlistment, but also, that the same was credited to the town before the day set for the draft, by competent proof. *Harbers et al. v. Tribby*, 56.

10. *As to party bound.* The lessees in the caption of a lease were described as "trustees of Quincy Lodge, No. 139, I. O. of G. Templars," and they executed the same in their individual names, and in the body of the instrument covenanted to pay the rent, without using any words to show an intention to bind the Lodge: *Held*, that they were personally liable, and that the words "trustees," etc., were merely *descriptio personæ*, and did not change the legal effect of their undertaking. *Stobie et al. v. Dilla*, 432.

11. *As to whether parties to a contract are joint contractors, or a part of them only sureties.* See SURETY, 5, 6.

12. *Of a contract of subscription by an individual toward the erection of a college.* See SUBSCRIPTION, 5, 6.



CONTRACTS. *Continued.*

AWARDING CONTRACTS IN CHICAGO.

13. *By the Board of Public Works.* See BOARD OF PUBLIC WORKS OF CHICAGO, 1.

CONVEYANCES.

SEVERANCE OF UNITY OF SEIZIN.

1. *What will pass to the several purchasers—easements.* The disposition and arrangement of the several parts of an entire building consisting of several parts, for various uses, for ease and convenience, and with reference to ways, light, and mutual supports, made by the owner in fee during unity of seizin, which are apparent and continuous, and necessary to the reasonable enjoyment of the several parts of the building, will be easements upon severance of title as to the different parts of the building, on the principle that every grant of a thing naturally and necessarily imports a grant of it as it actually exists, in the absence of any thing showing a contrary intention. *Morrison et al. v. King et al.* 30.

2. Such easements, when continuous and apparent during the unity of seizin, upon severance, will pass to the several holders of the premises, unless the contrary is provided for; and each portion of the several premises will pass subject to all the burdens and advantages imposed or conferred by the former owner. The grantees will each take their respective portions as they existed in the hands of the former owner; and the same rule applies to a severance by judicial proceedings for assignment of dower. *Ibid.* 30.

WHAT PASSES AS INCIDENT TO THE LAND.

8. *Without the use of the word "appurtenances."* Incorporeal hereditaments appendant or appurtenant to land, will pass by a conveyance of the land as an incident thereto. Thus, if a house or store be conveyed, every thing passes which belongs to, and is in use for, it, as an incident or appurtenant, without the use of the word "*appurtenances*" by mere operation of law. *Ibid.* 30.

DELIVERY AND ACCEPTANCE OF DEED.

4. A husband having enlisted in the United States army in February, 1862, executed to his wife, for the expressed consideration of one dollar, a deed of his real estate, for the purpose of enabling her to dispose of it for the benefit of herself and family in case he should not return from the service. He caused the same to be recorded. The wife never saw the deed until after his death, which took place in October, 1862. She found it in his papers, which he had left in her possession. She knew he had said he was going to make the deed. After his death the wife received the rents of the property, offered it for sale, and finally sold the same: *Held*, that the facts showed a delivery by the husband, and that the wife's assent to the transaction was clearly evidenced by

 CONVEYANCES. DELIVERY AND ACCEPTANCE OF DEED. *Continued.*

her receipt of the rents and offering to sell the property. *Dale et al. Lincoln, 22.*

5. To render a deed operative there must be a delivery and acceptance. No particular form or ceremony is necessary to constitute either, but there must be satisfactory evidence that the grantee has either actually accepted the deed, or has sought to become the beneficiary under it. It is well settled that a deed may operate by a presumed assent until a dissent appears. *Ibid. 22.*

6. *Presumption.* When a deed is produced by the grantee named therein, the presumption of law, in the absence of proof to the contrary, is that the deed was signed and sealed according to its purport, and that the grantee, having it in his possession, received it from the grantor. *Reed et al. v. Douthitt et al. 348.*

7. The requisites of a deed to convey land are, signing, sealing, and delivery, and when the deed is recorded by the grantee, even after the death of the grantor, the burden is on the grantor, or those claiming as his heirs, to prove clearly that the appearances are not consistent with the truth. The presumption of delivery must be destroyed by clear and positive proof. *Ibid. 348.*

8. *Delivery upon voluntary settlement.* The law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially when made to infants, than in ordinary cases of bargain and sale. *Ibid. 348.*

9. Where it appeared that a father had made advancements to his adult children and afterward signed, sealed, and acknowledged a deed for certain lands to his minor son, stating that he intended to make a provision for such son, but expected to live on the land until his death, and afterward spoke of the land as his son's, and the son exercised acts of ownership over it and leased portions of it before his father's death, and about sixteen months after the death of the father had the deed to himself recorded: *Held*, even if the father retained possession of the deed until his death that fact would not invalidate or defeat it. *Ibid. 348.*

10. A delivery of a deed is not to be proved by the grantee in it, but will be presumed; and if not delivered the retention of the deed by the grantor until his death will not destroy its effect as a deed when the circumstances or proof show it to be a voluntary settlement for a meritorious consideration upon an infant by a parent. *Ibid. 348.*

DEED FROM HUSBAND TO WIFE.

Of its validity. See HUSBAND AND WIFE, 1.

OF A DEED BY A CORPORATION.

As to the manner of its execution. See CORPORATIONS, 3, 4, 5.

CORONER.

SERVICE OF PROCESS BY DEPUTY.

1. When the office of sheriff has become vacant by his continued absence, the coroner becomes *ex officio* sheriff, and all the rights, powers, and duties of the sheriff will devolve upon him until the vacancy is filled in some other legal mode; and service of process by his deputy will be legal. *Reed v. Reber et al.* 240.

CORPORATIONS.

THROUGH WHAT OFFICERS THEY ACT.

1. In the absence of legislative enactment, or provision in their by-laws, corporations act through their president, or those representing him. Where an act pertaining to the business of the company is performed by him, it will be presumed that the act is legally done and binding upon the company. *Smith v. Smith et al.* 493.

2. As a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead, and perform the duties which devolved upon the president. In this case the charter did not mention a vice-president as an officer of the company, but, after providing for certain officers, it authorized the company to create other officers, and the company, in its by-laws, declared there should be a vice-president, and prescribed his duties: *Held*, that he might perform the duties imposed upon the president in the same cases and under the same circumstances, as though his office had been created by the charter. *Ibid.* 493.

OF A DEED BY A CORPORATION.

3. *As to the manner of its execution.* Where it appeared, from the minutes of a railroad board of directors, that a resolution was adopted directing the president of the company to sell a tract of land and to execute the necessary deed therefor, under the corporate seal, and the president subsequently elected having refused to act, the vice-president assumed to discharge the duties of president, and, in strict accordance with the resolution, conveyed the land by deed, under the corporate seal, signing as vice-president and acting president of the company, but the deed was not countersigned by the secretary, as required in the by-laws of the company: *Held*, that the deed was well executed, and amply sufficient to convey the title of the company. *Ibid.* 493.

4. While it is usual for the secretary of such companies to attest the execution of such instruments, as the keeper of the seal, yet, if the charter of the company does not require such attestation, the deed will be good without it. Strangers dealing with the company are not required to know the provisions of its by-laws, and are not bound by them. They can only be expected to see that such an instrument is executed in the usual form by the head of the company. *Ibid.* 493.

CORPORATIONS. OF A DEED BY A CORPORATION. *Continued.*

5. So, it has been held by this court that a deed executed by the president of a bank, with its seal attached, would be presumed to have been well executed and binding. *Smith v. Smith et al.* 493.

MUNICIPAL CORPORATIONS.

6. *Liability for injury to private property resulting from defective sewerage or drainage.* Even though the authorities of a city may be under a legal duty to afford sufficient drainage for the health and comfort of the inhabitants, and, in the discharge of such duty, construct a sewer or drain after the most approved plan, using the best material, and the work is done in the most skillful manner, yet they have no right thereby to concentrate the dirty water, offal, and filth of the city, or any portion thereof, and discharge the same upon the premises of an individual; and if, in so doing, a private injury is sustained, the city will be liable for the damages. It must so construct such improvement as to avoid injury to individual property. *City of Jacksonville v. Lambert*, 519.

7. Where a city constructed a sewer so that the garbage, suds and slops, offal and filth from the dwelling-houses and woolen mills by which it run was conducted, discharged, and flowed upon and through the real estate of the plaintiff, situate in the city and near the terminus of the sewer, corrupting and polluting the atmosphere so as to render the land unsaleable and unsuitable for residences, and otherwise injure the use of the land or a portion thereof: *Held*, that the city was liable to the plaintiff in case for the damages sustained. *Ibid.* 519.

8. *Compensation.* If, in abating or removing a public nuisance by a system of sewerage or drainage, it unavoidably inflicts an injury to private property, the corporate authorities should, by condemnation or otherwise, make compensation for the injury. *Ibid.* 519.

9. *Punitive damages.* Where a city, in constructing a sewer in good faith, of good material, and in a skillful manner, has caused an injury to private property by the flow of offal and filth from the terminus of the sewer upon and through such property, punitive damages are not authorized. *Ibid.* 519.

10. *Liability for injury resulting from an excavation made in a street by an individual.* See HIGHWAYS, 5.

11. *Action by the corporation against the wrong-doer to recover for money paid on account thereof.* See PLEADING, 1, 2.

CORPORATE AUTHORITIES.

WHO MAY LEVY TAXES. See TAXATION, 6, 7.

COSTS.

IN CHANCERY.

1. The award of costs in chancery suits is a matter of discretion with the court below. *Burton v. Mosher*, 277.

COSTS. *Continued.*

ON CONDEMNATION OF RIGHT OF WAY. See RIGHT OF WAY, 9.

CREDITOR'S BILL. See CHANCERY, 13, 14.

CRIMINAL CONVERSATION.

CONNIVANCE OF THE HUSBAND.

1. *Effect thereof on his right of recovery.* In an action of trespass for criminal conversation by the defendant with the wife of the plaintiff, an instruction which directed the jury that, even if they believed, from the evidence, that the wife of the plaintiff was ever so profligate, that would be no bar to his recovery, unless they further believed, from the evidence, that she was permitted to live as a prostitute, with the knowledge and consent of her husband, was regarded as erroneous, in that it required the participation of the husband in the misconduct of the wife to too great an extent in order to make it constitute a defense to the action, the connivance of the husband being enough to bar the action. *Lowe v. Massey*, 47.

2. And in view of the evidence tending to show the connivance of the plaintiff, it was *held* that to an instruction directing the jury that, in case they found the defendant guilty of the charges laid in the declaration, they were authorized to find for the plaintiff, should have been added the qualification, if there was not connivance on the part of the plaintiff. *Ibid.* 47.

CRIMINAL LAW.

LARCENY.

1. *Officer appropriating property levied upon to his own use.* A constable, having an execution placed in his hands, levied upon and took possession of certain goods belonging to the judgment debtor and put them in possession of the judgment creditor. A short time afterward the constable took the goods away, with the consent of the judgment creditor, and sold them at private sale, receiving therefor the sum of \$55, which he converted to his own use. In a prosecution against the constable, under an indictment charging him with having stolen divers United States notes and current bank bills for the payment of \$55, and of that value, of divers issues and denominations, to the grand jury unknown, the personal goods and property of Matthias Eck, who was the judgment creditor, it was *held* the prosecution could not be maintained—not under section 71 of the Criminal Code, declaring the felonious conversion of money, goods, etc., by a bailee to be larceny, because in no sense could the constable be regarded as the bailee of the judgment creditor, the general property in the goods after the levy, until a sale according to law, being in the judgment debtor, and the money derived from a sale is not the property of the plaintiff in the execution until paid over to him, but until that time is in the custody of the law. Besides, the

CRIMINAL LAW. LARCENY. *Continued.*

goods were not sold according to law, but at private sale—the officer, by such abuse of his authority, becoming a trespasser *ab initio*, and the judgment creditor could not, by ratifying such trespass, obtain a legal right to the fruits of the wrongful act of the officer. *Zachocke v. The People*, 127.

CURATIVE LEGISLATION.

WHETHER WITHIN THE POWER OF THE LEGISLATURE. See SUBSCRIPTION, 4; RAILROADS, 3, 4.

DAMAGES.

PUNITIVE DAMAGES.

Whether recoverable against a municipal corporation. See CORPORATIONS, 9.

EXCESSIVE DAMAGES. See NEW TRIALS, 12, 13.

AGGRAVATION OF DAMAGES.

Evidence in respect thereto. See MEASURE OF DAMAGES, 4.

DEFAULT.

SETTING ASIDE DEFAULT.

1. After judgment by default against a vessel in a proceeding by attachment for supplies, and, at the same term of court, a party applied to the court to have the default set aside and permit him to come in and defend the action as owner of the vessel, based upon his affidavit of ownership acquired by purchase on a sale of the vessel under a mortgage, which was a prior lien. In the attachment proceeding no owner of the vessel was named in the affidavit, statement of the claim, or warrant, and there was no published notice to any one of the pendency of the suit. The court refused the application: *Held*, that the court erred in the refusal. *Propeller Hilton v. Miller et al.* 230.

DELIVERY.

DELIVERY OF A DEED. See CONVEYANCES, 4 to 10.

DEMAND.

PROMISSORY NOTE.

Whether demand necessary. See PROMISSORY NOTES, 1.

DEPUTY.

CORONER'S DEPUTY.

May serve process. See CORONER, 1.

DESCRIPTION.

DESCRIPTION OF CHATTELS IN A MORTGAGE.

Whether sufficient. See MORTGAGES, 17.

DISCRETIONARY.

OF MATTERS THAT ARE DISCRETIONARY.

1. *Admission of further evidence after the case is closed.* See PRACTICE, 7.
2. *Taking proof on bill in chancery taken as confessed.* See CHANCERY, 1.
3. *Costs in chancery.* See COSTS, 1.

DIVORCE.

DESERTION.

1. Where the wife has absented herself from the house of her husband for more than two years before suit is brought for divorce, she must show, by a preponderance of evidence, that she was justified in so absenting herself, in order to prevent her husband from obtaining a divorce for such cause. *Carter v. Carter*, 439.
2. On the trial of the issues in a suit by a husband for divorce, on the ground of the wife's desertion, the court, at the instance of the wife, instructed the jury that they should determine, from all the facts and circumstances, what constituted a reasonable cause of abandonment: *Held*, that although the court, in other instructions, properly stated what acts of the husband would constitute reasonable cause, the court erred in giving this, as it was uncertain which the jury followed. *Ibid.* 439.
3. To justify a wife in leaving her husband, and absenting herself without giving him cause for divorce after the statutory period, it seems that his conduct must have been such as to authorize a divorce in her favor. *Ibid.* 439.

CRUELTY.

4. On the trial of a bill by the husband, and cross bill by the wife, for divorce, where the husband relied on desertion for the space of two years, and the wife charged him with extreme and repeated cruelty, and adultery, it appeared that the husband had made demonstrations of personal violence when highly excited by great provocation and wanton insult on the part of the wife, but committed no personal violence in fact; and it also appeared that the wife provoked the difficulty as a pretext for separation, and that the husband was a man of good disposition, a good citizen, and truthful: *Held*, that in view of the provocation, the acts of the husband were not such extreme cruelty as to entitle the wife to a divorce, or justify her abandonment of her husband. *Ibid.* 439.

ADULTERY.

5. *And the proof thereof.* A husband, after his wife left him, employed a widow woman to keep house for him, and, to avoid scandal, kept during the time a hired girl in the house, and it appeared that such help was necessary to enable him to carry on his farm. The wife, in a suit for divorce, attempted to prove that the widow's character for chastity

DIVORCE. ADULTERY. Continued.

was bad, to show that her husband was guilty of adultery with this woman, but no improper acts between them were proved: *Held*, that evidence of the general character of such widow was inadmissible to prove adultery; and that if her character had been shown to be bad, her employment, under the circumstances, was no evidence of adultery on the part of the husband. *Carter v. Carter*, 439.

6. The fact that the husband, after his wife left him, employed a man and his wife to come and stay at his house for a few days, although the character of the man's wife, for virtue, may not have been good, does not prove the husband's adultery, unless it is also shown that they were employed for improper purposes. *Ibid.* 439.

7. The charge of adultery must be shown by proof of acts and circumstances that convinces the mind by a preponderance of its weight, and not by mere suspicion or conjecture from vague or indefinite circumstances, pointing to no specific time, place, or act. Hence, evidence that defendant's character for virtue was not good, is not admissible on a charge of adultery. Nor is hearsay, or neighborhood rumor and gossip. *Ibid.* 439.

8. The fact that a husband, during his wife's absence, visited, on one or two occasions, female friends, and at one or more times was seen riding in a carriage with females, when the attendant circumstances failed to show that he acted improperly on such occasions, does not prove his adultery. *Ibid.* 439.

9. When immorality or wrong is imputed, such as adultery, it must be established by at least a preponderance of proof; and when the facts or circumstances relied upon to establish the same, may as well import innocence as guilt, they must be held to import innocence. *Ibid.* 439.

DOWER.**WHAT PASSES ON ASSIGNMENT THEREOF.**

1. When premises are assigned to a widow for dower, the assignment, like a deed, without mention of appurtenances, will pass all those things which are incidents appendant or appurtenant thereto; and, in the absence of any restrictions in the proceedings, it will be presumed that they were taken into consideration by the commissioners and regarded as a charge upon the other portion in favor of that allotted. *Morrison et al. v. King et al.* 30.

EASEMENTS.**SEVERANCE OF UNITY OF SEIZIN.**

1. *Easements pass to the several purchasers.* See **CONVEYANCES**, 1, 2.

REMEDY AS BETWEEN THE PURCHASERS.

2. *When one of them attempts to disturb the easement which is common to all.* See **INJUNCTIONS**, 2, 3.

EJECTMENT.**DEATH OF SOLE PLAINTIFF.**

1. *Revivor in the names of part of the heirs.* When the sole plaintiff in an action of ejectment dies, it is not necessary that the suit be revived in the names of all his heirs-at-law, and it is not error to allow the suit to be revived and prosecuted by a part of his heirs. *Funk v. Stubblefield et al.* 405.

2. On the death of the sole plaintiff in ejectment, intestate, leaving several heirs-at-law, the unity of title is severed into aliquot parts, and descends to such heirs, and they each become invested with a separate right of recovery. *Ibid.* 405.

OUTSTANDING TITLE.

3. *Fraudulent deed of trust.* The plaintiff in an action of ejectment deduced title through a sale under judgment and execution against a prior owner and sheriff's deed. The defendant offered in evidence a prior deed made by the same owner in trust for the benefit of creditors, which was recorded before the recovery of the judgment under which the lands were sold, to defeat a recovery by showing an outstanding title. This deed was held to be fraudulent on its face in imposing conditions and restrictions which were onerous and illegal: *Held*, that such deed being void could not be used to show an outstanding title. *Forsythe v. Hardin*, 206.

CONTRACT OF SALE BY THE PLAINTIFF.

4. *No defense.* When a plaintiff in ejectment shows a legal title in himself, the defendant can not defeat a recovery by showing that the plaintiff had brought suit upon a note given to him by one who had contracted to purchase the land of him. *Gladfelder et al. v. Hale*, 72.

ELISOR.**WHETHER PROPERLY APPOINTED.**

1. *And of being sworn.* Where the office of sheriff of a county was vacant, and the duties of the office were being performed by the coroner, who was a party defendant to a bill in chancery filed: *Held*, that the facts justified the clerk of the court in the appointment of an elisor to serve the summons. The statute does not require an elisor to be sworn. *Reed v. Moffatt et al.* 300.

EMINENT DOMAIN. See RIGHT OF WAY.**ERROR.**

ERROR WILL NOT ALWAYS REVERSE. See **PRACTICE IN THE SUPREME COURT**, 2, 3, 4.

ESTOPPEL.

AS BETWEEN VENDOR AND PURCHASER. See **VENDOR AND PURCHASER**, 6.

EVIDENCE.

PAROL EVIDENCE.

1. *To explain contract.* Where parties covenant personally to pay rent, and execute the obligation in their individual names, evidence *dehors* the written undertaking is inadmissible to show that they intended to bind an incorporated lodge, although in the body of the obligation they are described as trustees of such lodge. *Stobie et al. v. Dills*, 432.

2. *To explain who are meant by "heirs-at-law," as those words are used in a will, and to identify heirs.* See WILLS, 13, 14.

3. *To impeach the acknowledgment of a deed.* See ACKNOWLEDGMENTS OF DEEDS, 1, 2.

BURDEN OF PROOF.

4. *In action by bailor against bailee.* In an action by the owner of a team of horses to recover damages for an injury to them against the hirer for want of proper care, the defendant asked the court to instruct the jury, that if the team hired was in good condition when taken by defendant, and was not returned in such condition, and if the defendant had shown *prima facie* that he took ordinary care of the team, then the plaintiff must show, by a preponderance of testimony, that defendant misused the team so as to cause the injury complained of, which the court refused: *Held*, that the refusal was proper. *Funkhouser v. Wagner*, 59.

5. Where goods, when placed in the hands of a bailee, are in good condition, and they are returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose upon him the burden of showing that he exercised such care as was required by the bailment. *Ibid.* 59.

6. *As to abandonment of special contract.* When the plaintiff declares generally for work and labor done, and materials furnished, and the defendant files the general issue with notice that he will insist on the trial that the work was performed under a written contract, the burden of proof is not thrown upon the plaintiff to show an abandonment of the special contract, until the defendant has proved the averment in his notice. *Robinson et al. v. Parish*, 130.

7. *In a proceeding to contest a will.* See WILLS, 23.

SECONDARY EVIDENCE.

8. Where the obligors in a written instrument obtained its possession, refused to deliver the same to the obligee, but gave a copy thereof and destroyed the original, and when sued denied the execution of the contract declared on in a plea verified by affidavit, it was held that the copy, when accepted as such, was, as between the parties, of equal authenticity with the original. *White et al. v. Herrman*, 73.

EVIDENCE. SECONDARY EVIDENCE. *Continued.*

9. And when it appeared that such copy was left with plaintiff's attorney for suit, it was held error in the court to admit in evidence a copy of it made by plaintiff's attorney, upon the testimony of plaintiff that it was a copy of the original as nearly as he could recollect. The copy given by defendants was the next best evidence to the original, and should have been produced, or its non-production explained. *White et al. v. Herrman*, 73.

PROOF OF VALUE.

10. *On failure to convey land.* In a suit to recover damages for a failure to convey title when only a small sum was paid, the preponderance of the testimony showed that the land was worth no more than was agreed to be paid, but the plaintiff showed, without objection, that other lots in an adjoining tract had sold much higher by the front foot. This proof did not disclose the terms of the sale, the number of lots sold, or whether the purchases were *bona fide*: *Held*, that such evidence was too vague and unsatisfactory to furnish a proper indication of the value of eighty acres sold in a body. *Ibid.* 73.

ADMISSIONS.

11. *What is in the nature of an admission.* Where the authority of one to employ the plaintiff as an attorney was disputed, and the evidence on that point conflicting, and it was proved by two witnesses that they were present and heard defendant authorize the employment of plaintiff, the circuit court instructed the jury that, while it was competent for plaintiff to show the admissions and statements of defendant, as tending to show his liability, yet the law regards such admissions as a weak kind of evidence: *Held*, that the instruction was erroneous, because the testimony was not of admissions, but of an important fact, and in such a case it was for the jury alone to determine the weight of the evidence. *Mauro v. Platt*, 450.

12. *Of their weight as evidence.* It is not true that, under all circumstances, admissions of a party are weak evidence; sometimes they are the strongest and most satisfactory species of evidence. It is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled; and in case of a conflict the court has no right to tell the jury that an admission is a weak kind of evidence. *Ibid.* 450.

ADMISSIONS OF MORTGAGOR.

13. *As affecting rights of mortgagees.* The declarations and admissions of a mortgagor of chattels, made after the execution of a chattel mortgage by him, are not admissible in evidence to defeat the claim of the mortgagee, in a contest between the latter and one claiming under the mortgagor. *Bell v. Prewitt*, 361.

HEARSAY.

14. The defendant in a suit brought to recover damages on the

EVIDENCE. HEARSAY. *Continued.*

ground of false and fraudulent representations made by him in effecting a sale of Missouri lands to plaintiff, produced a witness who had entered the land and had sold the same to one H, and asked the witness, "What did H say to you in connection with the buying?" *Held*, that an objection to the question was properly sustained as calling for mere hearsay testimony. *Drew v. Beall*, 164.

QUESTIONING JUDICIAL PROCEEDINGS COLLATERALLY.

15. *Generally.* It matters not how erroneous the findings, judgments, and decrees of a court of general jurisdiction may be, when drawn in question collaterally, if the court had jurisdiction of the subject-matter and of the parties. They can not be questioned collaterally for mere errors or irregularities. *Hobson et al. v. Ewan*, 146.

16. A stranger to a judgment can not question its regularity collaterally. It may be erroneous and voidable, but if the court had jurisdiction of the subject-matter and the person, its determination is conclusive until reversed by an appellate court, unless the judgment is absolutely void. *Arnold et al. v. Gifford*, 249.

17. *Granting letters of administration—the regularity thereof can not be questioned collaterally.* See ADMINISTRATION OF ESTATES, 1.

TO PROVE A PARTY'S CONNECTION WITH A CONTRACT.

18. Where A undertook to build a school-house, and entered into a written agreement therefor to the school directors, with B and C as sureties for his performance, and A employed the plaintiff to assist him in the work, B and C having nothing whatever to do in the hiring or prosecution of the work, and after the completion of the work, plaintiff settled with A, when there was found to be due the plaintiff \$59.50 for work, and \$25 for money loaned to pay other hands employed on the work: *Held*, in such case it was error to refuse to permit B to testify that he and C had nothing to do with the hiring of the plaintiff or any other workmen on the house, and that they did not authorize A to employ plaintiff or any other person, and that they had no interest in the contract except as sureties for A. While such proof was perhaps not necessary, yet it was proper as tending to show they were not liable. *Stull et al. v. Hance*, 52.

TO EXPLAIN A CREDIT ENTERED BY MISTAKE.

19. Where the plaintiff, in the copy of his account filed with his declaration, by mistake had given defendant a credit of \$100, and defendant knew some time before the trial that the credit was claimed to have been made by mistake: *Held*, no error to allow the plaintiff on the trial to explain the credit. *Van Horn et al. v. Burroughs et al.* 388.

IN AN ACTION FOR SEDUCTION.

20. *Of a promise to marry.* In an action by a father for the seduction of his daughter, the admission of testimony that defendant had prom-

EVIDENCE. IN AN ACTION FOR SEDUCTION. *Continued.*

ised to marry the daughter, when the jury are instructed not to consider the promise of marriage in aggravation of damages is not erroneous, but proper. *Mains v. Cosner*, 465.

21. *That defendant's parents objected to the association.* In such action, the defendant offered to prove that his parents were opposed to his keeping company with plaintiff's daughter, on account of his youth and indiscretion, and that plaintiff had been notified of such fact, not directly from defendant's parents, which the court refused to admit: *Held*, that the court decided correctly. *Ibid.* 465.

22. *That plaintiff was warned of defendant's habits and character.* If the offer had been to prove that plaintiff had been warned against the defendant on account of his bad habits or profligate character, the evidence would have been admissible. But knowledge of the plaintiff that defendant's parents were opposed to his keeping the company of the daughter on the mere ground of youth and indiscretion would not indicate that a seduction was apprehended. *Ibid.* 465.

CERTIFICATES OF ARMY OFFICERS.

23. In an action to recover a stipulated compensation for an enlistment for the benefit of a certain town, the plaintiff read in evidence, against defendant's objection, the certificate, not attested by any seal of office, of an enlisting officer of the United States, and a certificate of the acting assistant provost-marshal for the State of Illinois, without official seal, to show the fact of enlistment to the credit of the town: *Held*, that there was no law making such certificates evidence in the courts of this State in controversies between its citizens. *Harbers et al. v. Tribby*, 56.

24. In such a case the fact that a person is an officer of the United States army, with power to give certificates of enlistment, can not be shown by proof that he acted as such. A certificate under the seal of the war department is the best evidence of his official character and authority. *Ibid.* 56.

STATEMENTS OF AN AGENT.

25. The statements of an agent made at the time of hiring a party to labor for his principal in reference to his employment, is not hearsay, but pertinent and legitimate evidence against the principal in a suit against him by the laborer to recover wages. *Miz v. Osby*, 193.

PROOF IN RESPECT TO AGENT'S AUTHORITY.

26. Where the plaintiff was employed to labor for the defendant by one claiming to act as defendant's agent, the fact that defendant, when called on for pay, was informed by the plaintiff that the agent claimed to be such, and failed to deny the agency, or the agent's authority to employ plaintiff, is competent evidence in a suit by the plaintiff against the defendant. *Ibid.* 193.

PROOF OF EXECUTION OF AN INSTRUMENT.

27. *Whether attesting witness must be produced.* The rule which re-

EVIDENCE. PROOF OF EXECUTION OF AN INSTRUMENT. *Continued.*

quires that the attesting witness to a written instrument shall be called to prove its execution, if within the State, has no application to a case where both parties to the instrument are in court and waive their right to insist on producing such witness. *Foraythe v. Hardin*, 206.

28. The reason for the rule requiring that the subscribing witness shall be called to prove the execution of a written contract, is to protect the interest of the party sought to be charged. Such party is a competent witness to prove its execution without producing the attesting witness. To deny the parties to such contract the right to admit its execution is entirely captious. *Ibid.* 206.

TO SUPPORT A TAX DEED.

29. *As paramount title.* On the trial of an action of ejectment, defendant offered in evidence, as paramount title, a tax deed for the premises, made in pursuance of a sale in 1859 for taxes, but did not offer to prove the steps indispensable to a valid tax sale, and did not produce the judgment and precept: *Held*, that the court did not err in rejecting the deed as evidence. *Smith v. Smith et al.* 493.

IN AN ACTION FOR TRESPASS TO THE PERSON.

30. In an action by a female for an assault and battery and assault with intent to commit a rape, a witness for plaintiff testified that defendant said, "He and his wife had n't got along first rate, and he had to be too intimate with the hired woman;" or, "was forced to be too intimate with the hired woman." It did not appear who this hired girl was, and the witness did not know who she was. The defendant moved to exclude this testimony for irrelevancy, which the court refused to do: *Held*, that the court erred in not excluding it, as it did not tend to prove the assault charged, and did tend to prejudice the defendant with the jury. *Sutton v. Johnson*, 209.

TO SHOW FRAUD IN A SALE.

31. In an action to recover damages for fraud and deceit in the sale or exchange of land—consisting of false representations as to the nature, quality, and value of the land sold—a witness was asked whether defendant told him a certain other person had shown him the land: *Held*, that the question was clearly proper. Whether defendant had seen the land or not, had a material bearing on the question of fraud. *Drew v. Beall*, 164.

CROSS-EXAMINATION.

32. The rule in this State is, that when one party introduces and examines a witness, the cross-examination is limited to the facts elicited by the examination in chief. When such cross-examination is carried to an unreasonable length upon new matters, and thereby improper testimony is obtained, it is error. *Bell v. Prewitt*, 361.

33. Where in a contest between the mortgagee of chattels and an as-

EVIDENCE. CROSS-EXAMINATION. Continued.

sumed purchaser, the former called the mortgagor and proved by him a single fact, viz.: that the cattle in controversy were the same described in the chattel mortgage; and the court then permitted, against objection, a lengthy examination of the witness by the opposite party in regard to the consideration of the mortgage, and various other matters, not elicited in the examination in chief, and wholly disconnected therewith, and a verdict resulted against the mortgagee: *Held*, that for this error the judgment must be reversed. *Bell v. Prewitt*, 361.

34. The plaintiff, as a witness in his own behalf, was asked the value of certain land. He had already shown that he was competent to give an opinion of the value of the land. The defendant asked leave to cross-examine him as to his means of knowledge before answering the question, which the court refused: *Held*, no error. *Drew v. Beall*, 164.

PARTY FAILING TO TESTIFY FOR HIMSELF.

35. *Intendment*. No intendment should be made against a party because he does not testify for himself. *Lowe v. Massey*, 47.

IN THE MATTER OF SPECIAL ASSESSMENTS.

Collector's delinquent list—whether admissible. See SPECIAL ASSESSMENTS, 13.

Proof of notice by commissioners—of the manner thereof. Same title, 4.

Proof as to payment. Same title, 14.

IN AGGRAVATION OF DAMAGES.

Proof of pecuniary ability of parties. See MEASURE OF DAMAGES, 4.

TO PROVE ADULTERY.

In a suit for divorce. See DIVORCE, 5 to 9.

OF THE ORDER OF INTRODUCING TESTIMONY. See PRACTICE, 8.

EXCEPTIONS AND BILLS OF EXCEPTIONS.**EXCEPTIONS.**

1. *Necessity thereof*. The overruling of a motion for a new trial can not be assigned for error when the bill of exceptions fails to show an exception taken to the ruling of the court. *Drew v. Beall*, 164.

BILLS OF EXCEPTIONS.

2. *When they do not purport to contain all the evidence—presumption*. When the bill of exceptions does not purport to contain all the evidence, it will be presumed that there was other evidence heard sufficient to justify the action of the court below. *Goodrich v. City of Minonk*, 121.

3. *How to remedy the deficiency—certificate of the judge—amendment*. When the bill of exceptions did not purport to set forth all the evidence, the

EXCEPTIONS AND BILLS OF EXCEPTIONS. EXCEPTIONS. *Continued.*

party in vacation procured the certificate of the judge who tried the case, without notice to the adverse party, that no other evidence was heard: *Held*, that such certificate was no part of the record, and could not be considered by this court. *Goodrich v. City of Minonk*, 121.

4. The party taking a bill of exceptions on discovering that it is imperfect in not stating that it contains all the evidence, should, on proper notice, apply in open court to have it amended, and then the amended record can be filed in this court. *Ibid.* 121.

5. *When necessary.* When the bill of exceptions does not contain any instructions or any ruling of the court thereon, nor exception to any such ruling, this court can not take notice of any. The fact that the clerk has copied into the transcript the instructions given and refused and exceptions, does not make them a part of the record. This can be done only by incorporating them into the bill of exceptions. *Drew v. Beall*, 164.

6. Unless the contrary is shown, it will be presumed on error, in a suit at law, that the court below decided correctly. *Indianapolis & St. Louis Railroad Co. v. Miller*, 468.

7. Where it is assigned for error that the court below refused to admit or hear testimony, its relevancy should be made to appear by bill of exceptions, otherwise this court will presume in favor of the ruling below, that such evidence was not pertinent to the issues. *Ibid.* 468.

8. *On appeal to the circuit court from common pleas court of Mattoon—evidence must be preserved by bill of exceptions.* See APPEALS, 2.

9. In case of an attachment of a vessel, under the law of this State, in the absence of a bill of exceptions preserving the evidence, this court will presume that every fact necessary to bring the case within the jurisdiction of the court and establish a cause of action was proved on the trial. *Tug boat E. P. Dorr v. Waldron et al*, 221.

EXECUTION.

RAILROAD FRANCHISE.

Whether subject to sale under execution. See RAILROADS, 5.

FORCIBLE ENTRY AND DETAINER.

FORCIBLE DETAINER.

1. *Vendor and purchaser.* When a party borrows money and conveys land to secure its repayment with interest, and takes back a contract for the re-conveyance of the land upon payment, the relation of vendor and vendee will not exist between them, and the party making the loan can not maintain forcible detainer to recover possession upon default of payment by the party in possession. Such a case is not within the statute of 1861. *West v. Frederick*, 191.

FORFEITURE.

As BETWEEN VENDOR AND PURCHASER. See **VENDOR AND PURCHASER**, 2, 4, 5.

FORMER ADJUDICATION.**WHETHER A BAR.**

1. A bill was filed by the heirs-at-law of a deceased person to set aside a sale of land made by the administrator under an order of court, on the ground that he was the real purchaser at his own sale, through the medium of a relative, who, after receiving a deed from the administrator, conveyed the premises to the latter. It was shown that on a former bill filed by the widow and infant heirs against the administrator, a decree was entered, by consent, setting off to the widow a homestead in the premises, the bill seeking no other relief: *Held*, that the decree in the prior suit was no bar to the second bill, as the matters involved in it were not adjudicated in the prior bill. *Williams v. Walker et al.* 517.

VERDICT IN REPLEVIN.

2. *Its effect on the title to the property.* See **REPLEVIN**, 4.

FRAUD.**MISREPRESENTATIONS.**

1. *Matter of opinion.* Where a party, before purchasing an undivided half of a tract of land, went upon it to satisfy himself of its situation and value, and after its partition with the defendant, the owner of the other half filed his bill in chancery, alleging that the defendant had falsely represented that the half set apart to him was of less value than the other half: *Held*, that, as the complainant had seen the land, though he had not gone over it with a view to have it divided, he could not be heard to say that he relied on the representations of the comparative value of the two parts thereof, and that it would be presumed he acted upon his own judgment. *Fisher v. Dillon*, 379.

2. In such case, a statement of the relative value of two portions of a tract of land, with a view to a division between the owners, will be regarded simply as an expression of opinion as to value. *Ibid.* 379.

As BETWEEN PRINCIPAL AND AGENT.

3. *And how far the fraud of the agent will affect the title of a purchaser from him.* See **AGENCY**, 2 to 9.

IN CHATTEL MORTGAGE.

4. *Which recites a greater indebtedness than exists.* See **MORTGAGES**, 16.

RESCISSION OF CONTRACT FOR FRAUD. See **CHANCERY**, 20 to 27.

FRAUD AND CIRCUMVENTION.

IN OBTAINING THE EXECUTION OF A PROMISSORY NOTE.

1. *What constitutes.* In an action on a promissory note by an assignee thereof before maturity against the maker, the defendant filed a plea, which disclosed facts showing that by an artifice of the payee of the note the defendant was induced to sign it as one payable absolutely, under the belief that he was signing another one of a different character, payable only on a contingency: *Held*, that such facts constituted fraud, not merely in relation to the contract or consideration of the note, but such fraud and circumvention in obtaining its execution as, under the statute, was pleadable in bar to any action on the note by any assignee. *Munson v. Nichols*, 111.

2. *Negligence of the maker—whether it may be urged on demurrer to a plea.* Nor could it be urged as matter of law on demurrer to such a plea that it disclosed facts showing such negligence on the part of the payee in executing the note and allowing it to go into circulation as avoided the defense. That would be a question of fact for the jury to determine. *Ibid.* 111.

FRAUD, STATUTE OF. See STATUTE OF FRAUDS.

HEIRS.

DEFINITION OF THE WORD. See WILLS, 10.

HIGHWAYS.

TIME OF ENTERING FINAL ORDER.

1. In this case, notice of the petition to establish a road was posted October 21. Thirty days thereafter (November 20th) the commissioners of highways met, in pursuance of notice, to hear reasons for and against the establishment of the road, and the prayer of the petition was granted and a survey ordered, which was entered of record. No final order was then made, and there was no adjournment entered to a future day. Nothing further was done by the commissioners until the 4th of December following, when the final order was made establishing the road, and on the 14th of December the damages were assessed: *Held*, on *certiorari*, that the final order was void, and that the proceedings should be quashed. *Wood v. Com'rs. of Highways*, 391.

2. The statute evidently contemplates that the final order establishing a road should be made within the thirty days from the posting of the petition, unless for good cause there is an adjournment for a reasonable time, entered on the record, so that parties interested may be advised of any future meeting in relation to the road. *Ibid.* 391.

3. If, at the meeting to hear reasons, of which notice had been given, the officers had entered an order for adjournment upon their records, for sufficient cause, and for a reasonable time, then they might be justified in making the final order after the expiration of the thirty days, as

HIGHWAYS. TIME OF ENTERING FINAL ORDER. *Continued.*

the land owners would then have some notice of the subsequent action.
Wood v. Com'rs of Highways, 391.

NOTICE OF MEETING TO HEAR REASONS.

4. The notice of the time and place of meeting of the commissioners to hear reasons for and against the proposed action, is in the nature of a condition precedent to any action on the part of the commissioners, and to the exercise of the power to appropriate the land of the citizen for the use of the road. *Ibid.* 391.

MUNICIPAL CORPORATIONS.

5. *Excavation by a private person—liability of town—notice.* Where a party without the consent of the authorities of an incorporated town, dug and left open a large pit in the street, along the sidewalk, in front of land owned by him, without any warning to passers-by, and while the same was so left exposed a person in the night-time, while exercising due care, fell into the pit and was injured: *Held*, that the town was not liable unless it had actual notice of the nuisance, or it had remained a sufficient time for notice to be implied. *Fahey v. Town of Harvard*, 28.

HOMESTEAD.**JUDGMENT IN CRIMINAL PROSECUTION.**

1. Under the laws of 1851 and 1857, the homestead is exempt from sale under a judgment for a fine and costs rendered in a criminal prosecution against the husband for a misdemeanor. *Loomis v. Gerson*, 11.

PAYMENT OF THE \$1,000 TO JUDGMENT DEBTOR.

2. But where the homestead was sold under such a judgment, it was *held*, that if the purchaser would pay to the grantee of the judgment debtor the \$1,000 exemption, he should be permitted to do so, and retain the title. *Ibid.* 11.

ABANDONMENT OF HOMESTEAD.

3. *What constitutes.* When a husband and wife had conveyed their homestead to A to secure a debt, and afterward procured A to convey the same to B, who paid the debt and something over, and B thereupon leased the premises to the husband, and gave the wife a bond for a deed to be made upon payment of a given sum within one year, but dispossessed them by forcible detainer before the expiration of the lease, and they left this State and resided about two years in Nebraska: *Held*, that if the husband and wife had any homestead right in the premises, it was abandoned and lost by their removing to and acquiring a home in Nebraska. *Carr v. Rising et ux.* 14.

4. *An intervening lien attaching.* In 1859 a husband and wife executed a deed of trust upon premises which had been occupied by them as a homestead, the title to which was in the wife, there being no release of

HOMESTEAD. ABANDONMENT OF HOMESTEAD. *Continued.*

the homestead right. Two years prior thereto they removed from the premises and were continuously absent until 1862, a period of five years, one year of which they resided out of the county. The husband when he left had contracted to open a farm upon which he was to reside three years. During the absence the home premises were rented to different persons. They were sold under the trust deed in March, 1861: *Held*, that the homestead right was lost by abandonment, and that the lien attached while such abandonment was complete, and could not be defeated by returning and residing on the premises. *Cahill v. Wilson*, 137.

POSSESSION BY TENANT.

5. *Whether notice to creditor.* When a party left his homestead some two years before he incumbered the same, and changed his residence, accompanied by his family, with a view of opening a farm and bettering his condition, it seems that the creditor could not be charged with information that the premises were claimed as a homestead, except by the actual residence of the party. The occupancy of a tenant will afford no notice of the right. *Ibid.* 137.

HUSBAND AND WIFE.

CONVEYANCE FROM HUSBAND TO WIFE.

1. *Of its validity.* A husband having enlisted in the army during the late civil war, by deed conveyed his whole real estate to his wife for the expressed consideration of one dollar, to enable the latter to dispose of the same for the benefit of herself and family in case of his death. After his death the wife sold and conveyed the same for its full value, and the proceeds were applied toward the support of herself and family. The heirs of the husband after their majority executed their conveyance for the same premises, and their grantee brought ejectment against the party holding under the deed from the wife; *Held*, on bill filed to enjoin the suit at law, that the husband's deed to his wife was void at law, but would be upheld in a court of equity. *Dale et al. v. Lincoln*, 22.

ILLINOIS CENTRAL RAILROAD COMPANY.

SALE OF ITS LANDS UPON CREDIT.

1. *Of compelling more prompt sales—and herein, of the duty of the company in respect to prompt collections.* By the act of 1854 (Sess. Laws 192), a reasonable discretion was granted to this company to sell its lands upon credit, and authority may properly be inferred to fix a reasonable minimum price. *The People v. The Illinois Central Railroad Co.* 510.

2. The courts have power to control any attempted abuse of the authority to sell on credit. The credit should not be extended so long as to postpone to an indefinite or an unusual time the day of payment. The price should not be so regulated as to prevent, or unreasonably retard, sales. *Ibid.* 510.

ILLINOIS CENTRAL RAILROAD COMPANY. SALE OF ITS LANDS
UPON CREDIT. *Continued.*

3. The company should not permit purchasers to retain the purchase money after maturity to evade the law, or with the view of relief from taxation, but should use all usual and reasonable efforts to enforce collections without unnecessary harassment or rigorous oppression of the debtor. Ordinary delay, not intended to further any bad or unlawful purpose, will not afford sufficient grounds for awarding a writ of mandamus. *The People v. The Illinois Central Railroad Co.* 510.

4. The provision in the charter of the company directing that all the lands remaining unsold at the expiration of ten years from the completion of the road and its branches, shall be offered at public sale annually, until the whole is disposed of, imposes a duty in such vague and general terms, that this court, in view of the serious consequences and difficulties in the way, does not feel justified in enforcing it by *mandamus* without further legislation. If the legislature should prescribe the terms of sale, the mode in which it should be conducted, not inconsistent with the rights of the company, and make the directions plain and definite, this court can then act upon its requirements and enforce them. *Ibid.* 510.

INJUNCTIONS.

TO PREVENT THE HOLDING OF AN ELECTION.

1. A court of chancery has no jurisdiction to enjoin the holding of an election by the people, and a writ issued for that purpose is void, so that to disregard the writ will not subject a party to punishment as for a contempt of court. *Dart et al. v. The People*, 306.

TO PREVENT THE DISTURBANCE OF EASEMENTS.

2. *On severance of the unity of seizin of a building.* When the owner had so constructed and arranged a large building of three stories, consisting of many apartments, rooms, and offices, devoted to different uses, that certain stairways furnished the only access to the upper stories, and the stairways and halls were lighted by a skylight in the roof, and the same was so continuously used until after his death, when one end of the building, including one-half of the stairways, was assigned to his widow as her dower, and the other portion, including all the skylight, passed to devisees under his will, and the devisees proposed to tear down their part of the building, and erect another in its stead four stories high, not because of dilapidation, but because it was not of fine enough quality, the effect of which was practically to destroy access to the second story of the widow's portion, destroy all access to the third story, and the lights, and render the rest of the building unsafe by the removal of the necessary supports to the wall, and untenable, thereby causing great injury and damage: *Held*, that a decree on bill by the widow against the devisees, restraining them from their proposed action, under the circumstances of the case, was proper. *Morrison et al. v. King et al.* 30.

INJUNCTIONS. TO PREVENT THE DISTURBANCE OF EASEMENTS. *Continued.*

3. Where the owners of part of an entire building propose to tear down their part thereof to the destruction or great injury of the rights of the owner for life of the remaining part of the building, consisting in certain easements established during the unity of seizin, it was held, that a court of equity had jurisdiction to entertain a bill to restrain the injurious act. *Morrison et al. v. King et al.* 30.

INSANITY.

PRESUMPTION.

1. Every man is presumed to be of sane mind until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental—caused by the violence of disease. *Trish et al. v. Newell et al.* 196.

2. There is a distinction in the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. In the first place, proof is required to show a restoration; while, in the other, the party alleging insanity must bring his proof of a continued derangement to that point of time which bears directly upon the subject in controversy. *Ibid.* 196.

3. It is no more a presumption of law that a person rendered unconscious and incapable of mental action by a stroke of paralysis, will continue so for four months thereafter, than that he would if the same effect was produced by a wound on the head. Such a result may follow in either case, but the law will not so presume. *Ibid.* 196.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *When each should be correct in itself without reference to others.* In an action against a railroad company to recover for personal injuries, where the plaintiff's right to recover depends not only upon the fact of negligence in the defendant, but also upon the degree of defendant's negligence as compared with his own contributing to the injury, and the evidence is conflicting and doubtful, his instructions should each be correct in itself without reference to others in the series or those for the defendant. In such case an instruction that if the defendant's servants were guilty of negligence, the defendant is liable therefor, is erroneous, in not further requiring the jury to consider the degree of the plaintiff's negligence. *Chicago & Alton Railroad Co. v. Murray*, 326.

2. *Assuming the existence of a contract.* In a suit to recover damages for the non-delivery of hogs under an alleged contract, the court instructed the jury as follows: "It is incumbent on the defendants, under the contract alleged in plaintiff's declaration, to show an offer to per-

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

form, or some excuse for non-performance on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that plaintiffs were ready and willing to perform their part of the contract:" *Held*, not liable to the objection that it assumed the existence of the contract, and when taken in connection with the others given could not mislead the jury. *Bird et al. v. Forceman et al.* 212.

3. *Based upon the evidence.* Where there is any evidence bearing upon a question it is not error to give an instruction based upon the fact sought to be established by such evidence. The weight of the evidence is a question for the jury. *Van Horn et al. v. Burroughs et al.* 388.

4. *Selecting isolated facts.* The practice of selecting an isolated portion of the evidence and basing an instruction on it, should not be encouraged. But this court will not reverse for that reason alone, unless it can see that it probably misled the jury. *Mix v. Oby*, 193.

5. *Should not be obscure.* In an action to recover for work and labor done, and materials furnished, in the erection of a church, it appeared there was a special contract to complete the building by a certain day at a certain price, payable in installments, and that the plaintiff did not complete the same, defendants claiming that he had abandoned the work. The court instructed the jury for the plaintiff, that if they believed, "from the evidence, that defendants committed the first breach of the contract by ignoring their obligations under it, and on account of such breach by the defendants the plaintiff is entitled to recover for the full amount of the work done by him at the time the defendants took possession of the building, to be estimated according to the original contract price, if the jury find from the evidence that such work has not been all paid for:" *Held*, that the instruction was obscure and calculated to mislead. The breach of defendants relied on to justify an abandonment should have been stated and left to the jury to be found from the evidence. *Cong'l Society of Evanston v. Hubble*, 161.

6. Instructions should not only be correct in their propositions of law, but should be expressed in clear and concise language, without the use of words meaningless, or tending unnecessarily to embarrass the opposite party. *Triah et al. v. Newell et al.* 186.

7. *Need not be repeated.* It is not error to refuse instructions when the legal propositions contained in them are embraced in others which are given. *Bourne v. Stout*, 261; *Chicago & Alton Railroad Co. v. Murray*, 326.

8. *Instruction as to facts—not allowable.* See JURY, 1.

INSURANCE.

MARINE INSURANCE.

1. *Implied warranty.* By the rules of the law merchant and the common law, every voyage policy of insurance of a vessel implies a warranty of seaworthiness, and this warranty relates to the beginning of

INSURANCE. MARINE INSURANCE. *Continued.*

the risk, and that is when the vessel sails. Seaworthiness at the commencement of the voyage is a condition precedent; and if it does not then exist the policy is void, and the insurers are not responsible for a subsequent loss, even if it arises from another cause. *Merchants' Ins. Co. of Chicago v. Morrison*, 242.

2. *Extent of warranty.* This implied warranty imports that the ship is staunch and sound; of sufficient materials and construction, with sufficient sails, tackle, rigging, cables, anchors, stores, and supplies; a captain of competent skill and capacity; a competent and sufficient crew; a pilot when necessary, and, generally, that she is, in every respect, fit for the voyage insured. *Ibid.* 242.

3. *Distinction as to time policy.* But when a vessel was insured from the 1st day of April to the 30th day of November, 1869, against perils of the lakes, rivers, canals, fires, and jettison, excepting all losses, perils, misfortunes, or expenses arising from incompetency of the master, or insufficiency of the crew, or want of ordinary care and skill in navigating the vessel, and in loading, stowing, and securing the cargo, rottenness, inherent defects, overloading, and all other unseaworthiness, etc., and the policy contained an express warranty that the vessel was then in safety, and as to the business for which she was to be used, and the same was destroyed by fire while in port, not resulting from unseaworthiness: *Held*, that this being a time policy, as distinguished from a voyage policy, the law did not imply a warranty that the vessel should be seaworthy when she set out upon her first voyage, and that the company was liable for the loss. *Ibid.* 242.

WRITTEN CONSENT—WAIVER.

4. A clause in a policy of insurance sued on made it void if gunpowder was kept in the building insured without written permission, and it further declared nothing less than a distinct agreement, indorsed on the policy, should be construed a waiver of any condition or restriction. The assured, at the time of the loss, had a few pounds of gunpowder kept with the knowledge and express permission of the local agent of the company. A previous policy had been issued by the same agent upon the same property, and all premiums had been paid and accepted by the company, and the agent knew that powder was kept, and expressly permitted it without calling the attention of the assured to this clause in the policy: *Held*, that the failure to have the written consent of the company indorsed on the policy, under such circumstances, did not render it void, but that the condition would be regarded as waived. *Reaper City Ins. Co. v. Jones*, 458.

5. As the provision of forfeiture was made solely for the benefit of the company, it might waive the condition, and, as it performs its business through agents, their acts must often operate as a waiver of conditions in a policy. The company being presumed to have knowledge

INSURANCE. WRITTEN CONSENT—WAIVER. *Continued.*

of the facts through their agent, by taking the money of the assured, and giving him no notice that the policy had been violated, or that the contract must terminate, before his loss, will not be allowed to resist payment for such cause. Such an act would be a fraud and a deceit, which the law will not sanction. *Reaper City Ins. Co. v. Jones*, 458.

KNOWLEDGE OF THE AGENT.

6. *Notice of conditions to the assured.* When the agent of an insurance company takes an application of insurance, knowing that the assured is keeping interdicted articles prohibited by conditions usually printed in small type, and difficult to read, and gives no notice to the assured of the stringent character of such conditions, but consents to the keeping of such articles, the company will be held to have waived the right of forfeiture. *Ibid.* 458.

INTEREST.**PROMISSORY NOTE.**

1. *Readiness to pay at the specified time and place—effect thereof on accruing interest.* See PROMISSORY NOTES, 2.

2. *Effect of a state of war in that regard.* Same title, 3.

ON FORECLOSURE.

3. *Of compound interest.* See MORTGAGES, 15.

ITS ALLOWANCE IN AN AWARD.

4. *Whether proper, and at what rate.* See ARBITRATIONS AND AWARDS, 2.

JUDGMENTS.**UPON WHOM BINDING.**

1. Where land was attached and a grantee of the plaintiff filed an interpleader, claiming title as against the attaching creditor, which the latter attempted to defeat by showing a prior deed from himself to the defendant in attachment and notice thereof to the party interpleading, and the defendant in attachment was in court only by constructive service: *Held*, that a judgment in favor of the party interpleading was not binding as between the two grantees in any future contest between them in respect to the title. *Needham v. Clary*, 344.

VACATING A JUDGMENT TO LET IN A DEFENSE.

2. Appellant was sued jointly with another in trespass for an assault and battery. His co-defendant employed counsel who filed a plea of the general issue for both, there being no service. The counsel, about three years afterward, procured the entry of a *nolle* as to the co-defendant, and abandoned the defense of appellant, on the ground that he had paid no fee, and his default was taken, and damages assessed at \$500,

JUDGMENTS. VACATING A JUDGMENT TO LET IN A DEFENSE. *Continued.*

upon which judgment was rendered. He at the same term moved to set aside the judgment and for leave to defend, showing that he was not guilty, and that the other defendant who had committed the trespass had agreed to defend. The court overruled the motion: *Held*, that the court erred in refusing the motion. *Souerbry v. Fisher*, 135.

3. *And herein, of the power of the court over the record during the term.* In a suit against several where it appeared that the attorney for the defendant served with process, entered the appearance of the other defendants not served, without any authority whatever, and where such defendants, at the same term, after judgment against them, appeared and asked to have the judgment against them set aside, and a new trial granted, and showed a valid defense: *Held*, that it was error to refuse the motion. *Leslie et al. v. Fisher*, 118.

4. During the term the record of the court may be altered, changed, or amended as justice may require; and the court may vacate a judgment, and let in parties not served to defend. *Ibid.* 118.

HOW FAR JUDGMENT CONCLUSIVE.

5. *In a collateral proceeding.* See EVIDENCE, 15, 16.

JUDGMENT IN ATTACHMENT.

6. *When limited to the amount claimed in the affidavit.* See ATTACHMENT, 3.

JURISDICTION.

OF JUSTICES OF THE PEACE.

A bill for an act entitled "*An act to increase the jurisdiction of justices of the peace and police magistrates,*" printed in the Session Laws of 1871, did not become a law. See STATUTES.

JURISDICTION IN CHANCERY. See CHANCERY, 1.

JURY.

QUESTIONS OF LAW AND FACT.

1. According to the practice in this State the court is not justified in instructing the jury that any fact has or has not been proved, where any evidence has been admitted bearing upon the point, except where a question of law is involved, as in the proof of title. *Stobie et al. v. Dilla*, 432.

2. *Credibility of witnesses.* When the testimony of the witnesses is conflicting as to any material fact, the weight to be given to one witness more than to another should be left to the jury. *Chicago City Railway Co. v. Young*, 238.

3. *As to the existence of probable cause.* In a suit for malicious prosecution, the court can not rightfully say to the jury, that there is, or is

JURY. QUESTIONS OF LAW AND FACT. Continued.

not, probable cause, but it is the duty of the court, when asked, to inform the jury what facts constitute, and what do not constitute, probable cause, leaving it to the jury to say whether such facts are proved. *Bourne v. Stout*, 261.

4. *Whether the maker of a promissory note was negligent as to the character of the instrument he signed.* See FRAUD AND CIRCUMVENTION, 2.

5. *As to the intent in publishing a slanderous statement.* See SLANDER, 2, 3.

IN CHANCERY—CONTEST OF A WILL.

6. *Trial by jury not always necessary.* See WILLS, 20.

TAKING PRIVATE PROPERTY FOR PUBLIC USE.

7. *Compensation to be determined by a jury.* See RIGHT OF WAY, 1 to 8.

JUSTICES OF THE PEACE.**OF THEIR JURISDICTION.**

A bill for an act entitled "*An act to increase the jurisdiction of justices of the peace and police magistrates*," printed in the Session Laws of 1871, did not become a law. See STATUTES, 1.

LANDLORD AND TENANT.**HOW THE RELATION TERMINATED.**

1. Where, before the expiration of the term, the landlord, with the consent of the lessee, makes a new lease to another person, who enters into possession and pays rent to the landlord, this will terminate the first lease, and from that time will bar a recovery of rent from the first lessee. *Stobie et al. v. Dilla*, 432.

2. In a suit upon a written lease for the recovery of rent, the defendants, who were the lessees, pleaded in bar as to the rent from a certain day, that on such day the plaintiff, with the assent of defendant, leased the premises to another person named, at a specified rent, and accepted such person as his tenant in the place of the defendant; that such person took possession of the premises, and has since paid the plaintiff all the rent due under his lease, and the acceptance of rent from such new lessee by the lessor, whereby the said indenture (sued upon) was canceled and annulled: *Held*, that the plea showed a complete defense to the recovery of rent accruing after such new arrangement. *Ibid.* 432.

3. *Surrender or abandonment by the tenant.* The lessee can not surrender premises leased to him, before the expiration of the term, so as to absolve himself from the payment of rent thereafter, without the consent of the lessor; and the abandonment of the premises, with notice thereof to the lessor, will not exonerate the lessee thereafter from his obligation to pay rent, unless the lessor assents thereto. *Ibid.* 432.

LANDLORD AND TENANT. *Continued.*

RIGHT OF POSSESSION IN CROPS.

4. *Where the landlord held the property in them as security.* In a suit upon a replevin bond, brought after the dismissal of the replevin suit, the only issue made by the pleadings was, in whom was the right of possession to the crops replevied at the time of suing out the writ of replevin? It appeared that the plaintiff in replevin had leased his farm to the defendant in the replevin suit, reserving the property in the crops as security for the delivery of his share thereof. The jury found the right of possession in the tenant, the plaintiff in the suit on the bond: *Held*, that the verdict was right; and although the defendant may have had the property in the crops as a security, yet the right of possession was in the plaintiff. *Dunning v. South*, 175.

LEGAL TENDER NOTES.

FORECLOSURE OF MORTGAGE.

1. *Executed before the passage of the legal tender acts.* A decree on the foreclosure of a mortgage required the payment of the sum found due to be paid in gold coin. The note and mortgage were made before the passage of the legal tender act, and contained no provision as to what kind of money should be paid, but were in the usual form for the payment of so many dollars: *Held*, that the decree in this respect was erroneous. *McInhill v. Odell et al.* 169.

LIBEL.

PRIVILEGED COMMUNICATION.

1. *Presenting a person for malfeasance in office.* On the trial of an action on the case for libel, the plaintiff offered in evidence a petition to the judge of the circuit court, signed by the defendant and others, charging the plaintiff with gross neglect of his duty as State's attorney of the circuit; with being willfully and corruptly guilty of oppression in office, and of corrupt malfeasance in office; of taking bribes from parties accused and indicted, and in pursuance of corrupt agreements releasing them from prosecution, and containing many and various specific charges, and concluding by asking the judge to suspend the plaintiff from the discharge of the duties of his office until the grand jury could investigate the charges. The circuit court on objection refused to admit the same as evidence, on the ground that it was a privileged communication: *Held*, that the court erred in refusing to admit the same. It should have been admitted, and then the question would be whether it was presented in good faith for the purpose of having a State's attorney *pro tem.* appointed to prepare and prosecute an indictment against the plaintiff, or prepared for a bad purpose and from malicious motives. *Whitney v. Allen* 472.

LIENS.**OF AN ATTORNEY'S LIEN.**

1. *And the enforcement thereof in equity.* Where a bill in chancery showed that complainant made a contract with the defendants, who were non-residents, by which he undertook the collection of a debt secured on a tract of land, incurring all necessary expenses and costs, and assuming all risks, and for which, if successful, he was to receive one-fifth of the proceeds, whether land or money; that a suit in chancery was commenced by him and prosecuted to final decree, a sale of the land made, and certificate of purchase issued to one of defendants, and that they had refused to recognize the rights of complainant, with prayer for a decree for one-fifth of the land, if not redeemed, otherwise for one-fifth of the proceeds: *Held*, on demurrer, that the complainant was entitled to the relief sought, being entitled to an equitable lien on the land under the contract. *Smith v. Young et al.* 210.

EQUITY CAN NOT CREATE A LIEN.

2. A court of equity has no power to create a lien beyond the general one which follows from a decree for the payment of money. It can only recognize and enforce a lien which is created by the acts of parties. *Dewey et al. v. Eckert*, 218.

JUDGMENT LIEN.

3. *As against a prior grantee.* Where a grantee of land had his deed duly recorded before the recovery of a judgment against his grantor, the judgment did not become a lien upon the land, and a purchaser of the same, under execution on such judgment, will acquire no title. *Smith v. Smith et al.* 493.

MECHANIC'S LIEN.

4. *Rights of a sub-contractor.* In a suit by a sub-contractor against the owner of a building to recover for labor performed on defendant's house, which he did under the contractor, it appeared that the contractor had abandoned the work and that defendant had fully paid him all he was entitled to before receiving any notice of the plaintiff's claim: *Held*, that the plaintiff was not entitled to recover. *Schultz v. Hay*, 157.

ATTACHMENT OF BOATS AND VESSELS.

5. *Of the lien for materials and supplies.* See ATTACHMENT OF BOATS AND VESSELS, 1, 2, 3.

6. *A mortgage has precedence of the lien of a material-man subsequently acquired.* See MORTGAGES, 5.

LIMITATIONS.**WHEN THE STATUTE BEGINS TO RUN.**

1. In a suit by a plaintiff to recover for services rendered as an architect, in which the statute of limitation was pleaded, it appeared that

LIMITATIONS. WHEN THE STATUTE BEGINS TO RUN. *Continued.*

the plans were completed more than five years before suit was brought, but that he continued to act as architect, superintending the work on a church until within five years of bringing the suit, when he was discharged: *Held*, that the statute began to run only from the time of his discharge. *Catholic Bishop of Chicago v. Bauer*, 188.

WHAT WILL BAR A MORTGAGE.

2. The statute of limitations which bars the debt can alone bar the mortgage. Until the statutory bar of the debt is complete, an action of ejectment can be maintained, or the mortgage foreclosed by bill in chancery, or by *scire facias*. *Medley et al. v. Elliott et al.* 532.

LIMITATION ACT OF 1839.

3. *Color of title—what constitutes.* A bond conditioned for the execution and delivery of a deed upon a compliance with its terms in the future is not color of title within any fair construction that has been or can be given to the 8th section of Ch. 24 R. S. 1845. It does not, on its face, purport to convey title. *Rigor v. Frye et al.* 507.

4. To constitute color of title under either the eighth or ninth sections of this statute, the deed or instrument must purport, on its face, to convey the title to the land to the grantee named. It must apparently transfer the title to the holder of an interest in the land to enable him to invoke the aid of either section of the statute. *Ibid.* 507.

5. In ejectment the plaintiff showed a *prima facie* title to the land in controversy. The defendant had been in possession of the premises seven years before the institution of the suit, and had paid all the taxes legally assessed thereon during that period, but had no deed purporting to convey the title to the same during the first four years of his possession. During that period he only held a bond for a deed from a person whose only claim to the land was a certificate of purchase at a tax sale: *Held*, that the defendant could not invoke the aid of the eighth section of the conveyance act to defeat a recovery. *Ibid.* 507.

6. It seems that no distinction can be taken as to what constitutes color of title under the eighth and ninth sections of the conveyance act. *Ibid.* 507.

7. *Who may rely upon the statute.* The grantees of a mortgagor are not protected in their title against the foreclosure of the mortgage duly recorded, by seven years' possession and payment of taxes under the first section of the limitation law of 1839. *Medley et al. v. Elliott et al.* 532.

8. From the peculiar relation of mortgagor and mortgagee, and the fact that a purchaser from the former succeeds only to his rights, with notice of the incumbrance, and the consequent privity between the parties, the possession of such purchaser must be considered as in subordination to the mortgage, and not hostile; and it can not cease to be of that character until there is an open disclaimer of holding under it,

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

and the assertion of a distinct title with the knowledge of the mortgagee. *Medley et al. v. Elliott et al.* 532.

9. *Character of possession required.* The possession required under the limitation law of 1839 must be adverse. It must be hostile in its inception, and so continue. It must be an actual, continued, visible, notorious, distinct, and hostile possession. *Ibid.* 532.

MALICE.

IN SLANDER. See SLANDER, 1, 2, 3.

MALICIOUS PROSECUTION.**PROBABLE CAUSE.**

1. In an action for malicious prosecution in procuring the plaintiff's arrest on a criminal charge, if it appear that defendant had probable cause to believe that plaintiff was guilty, the defendant will not be liable. *Bourne v. Stout*, 261.

2. In such a case it is not necessary that all the facts shall be true upon which the prosecutor acts. If he honestly believes them to be true, and they are of such a character as would induce a reasonable and prudent man to believe them to be true, then there is probable cause. *Ibid.* 261.

3. *Advice of counsel.* Where a party procured an indictment to be found against another, it was *held*, in an action for malicious prosecution against him, that, if in so doing he acted under the advice of counsel, after having communicated to such counsel all the facts bearing upon the guilt or innocence of the accused, of which he had knowledge, or could, by reasonable diligence, have ascertained, the advice thus given was a protection against such prosecution. *Wicker v. Hotchkiss*, 107.

MANDAMUS.**WHEN AWARDED.**

1. A writ of mandamus is never granted, of course, but only at the discretion of the court, and only where some just and useful end is to be attained. *The People v. Illinois Central Railroad Co.* 510.

WITHDRAWING DEMURRER TO RETURN.

2. *And forming issue of fact.* The return to the alternative writ in this case having traversed all the material allegations in the writ, a demurrer thereto was overruled, and leave given the relator to withdraw the same, and make an issue of fact. *Ibid.* 510.

MEASURE OF DAMAGES.**IN AN ACTION FOR PERSONAL INJURIES.**

1. *Whether mental anguish to be considered.* In an action to recover

MEASURE OF DAMAGES. IN AN ACTION FOR PERSONAL INJURIES.
Continued.

damages for a personal injury from being struck by a train of passing cars, on the ground of negligence, the court instructed the jury in case they found for the plaintiff, in assessing damages they might take into consideration the plaintiff's pain and anguish of mind consequent upon such injury: *Held*, that there was no error. But mental anguish not connected with bodily injury is not proper to be considered in such a case. *Indianapolis & St. Louis Railroad Co. v. Stables*, 313.

FRAUD IN EXCHANGE OF PROPERTY.

2. Where the plaintiff was induced by fraudulent representations of defendant as to the condition of certain Missouri land, which proved to be untrue, to give in exchange a house and lot for the land and \$800 in money, and deeds were made each to the other for the property exchanged, it was *held* the plaintiff was entitled, under the contract, to have such a tract of land as it was represented to be; and if he did not get it, the measure of damages was the difference between the actual value of the land, and the value of the same if it had been such as it was represented. *Drew v. Beall*, 164.

3. After an exchange of a house and lot by plaintiff with defendant for a tract of Missouri land and \$800, effected by fraudulent representations of defendant as to the condition, quality, and value of the Missouri land, the defendant, when sued in an action on the case for the fraud and deceit, offered to prove the value of the house and lot he received of plaintiff as affecting the question of damages, which the court refused to allow: *Held*, that the proof was properly rejected, as the plaintiff was entitled to the benefit of his bargain; and it was not for the jury to make a new contract for the parties or fix a new price on plaintiff's property for the parties. *Ibid.* 164.

AGGRAVATION OF DAMAGES.

4. *Proof of pecuniary ability.* On the trial of an action against a street railway company and the conductor to recover for personal injuries for the acts of the servants of the company, the court received evidence of the pecuniary ability of the company in aggravation of damages: *Held*, that the admission of the evidence was improper, as the conductor was liable for the judgment, and the evidence as to him was highly prejudicial. *Chicago City Railway Co. et al. v. Henry*, 142.

RECOVERY ON PARTIAL PERFORMANCE.

5. In an action seeking to recover for services on partial performance of a special contract on the ground of cause for not fully performing, where there was proof of payment, it is error to instruct the jury that if there was cause for abandoning the work before completion, the plaintiff is entitled to recover for the full amount of the work done according to the contract price, provided the work had not all been paid for. It should have authorized the recovery of the unpaid balance only. *Cong'l Society of Eranston v. Hubble*, 161.

MEASURE OF DAMAGES. *Continued.*

ON CONDEMNING RIGHT OF WAY. See RIGHT OF WAY, 10 to 14.

MECHANIC'S LIEN. See LIENS, 4.

MERGER.**WHETHER THE DOCTRINE WILL BE APPLIED.**

1. Courts of equity will not apply the technical doctrine of *merger* where the intention or the just interests of the parties require the incumbrance to be kept alive. Where it is perfectly indifferent to the party in whom the interests are united, whether the charge should or should not subsist, it will sink, but where it is to his interest that it should be kept on foot, the court, in the absence of an expressed intention, will so decree. *Fowler v. Fay et al.* 375. See MORTGAGES.

MISTAKE.**WHEN INVOLVED IN FRAUD.**

Will not be allowed to be corrected. See CHANCERY, 24.

MORTGAGES.**WHETHER A MORTGAGE OR A SALE.**

1. Where a person advances money, and at the same time receives a deed and gives back a bond to the grantor for a reconveyance, these facts incline to the belief that the transaction is a loan and a security; but not so, when the conveyance is made by the person to whom the consideration is paid, and the obligation to convey is given to another. *Carr v. Rising et ux.* 14.

2. When the owner of land caused the party holding the legal title to convey the same to the defendant for the consideration of \$2,300, the full value of the premises, taking back a bond for a deed upon payment of \$2,401, in one year thereafter, and a lease of the premises, and when sued in forcible detainer for possession, filed no bill to restrain the proceeding and have the transaction declared a mortgage until over two years afterward, and permitted the grantee to expend about \$1,500 in improvements without asserting any right, and no obligation was given to the grantee for the payment of the money advanced by him, so that he might foreclose if the transaction was intended as a mortgage, and the former owner while in possession directed the assessment of the land to the defendant, and in a former suit in answer to a cross bill, denied that defendant had given the bond for reconveyance; and when the witnesses present at the execution of the deed, when all the parties were present, did not understand the transaction to be a security for money loaned: *Held*, on bill filed to redeem, that the transaction could not be regarded as in the nature of a mortgage, a security for money loaned, but was an absolute sale. *Ibid.* 14. See also VENDOR AND PURCHASER, 1, 2, 3.

MORTGAGES. *Continued.*

MORTGAGEE PURCHASING THE FEE FROM MORTGAGOR.

3. *Rights of intermediate incumbrancers—merger.* In 1866 A & B mortgaged certain lots held by them in severalty to C to secure the payment of a note of \$2,912.37, and C being indebted to D & Co. assigned to them this note and mortgage as collateral security. In September, 1868, A mortgaged his part of the same lots to F to secure a debt of \$1,000, owing from A & B. In December following A & B by warranty deed conveyed the mortgaged lots to C for the expressed consideration of \$8,000. This deed was expressed to be subject to the mortgage to F, but contained no provision that the grantee should pay off such mortgage: *Held*, that the effect of the deed from the mortgagors to C was not to merge the first mortgage in the fee so far as the rights of C were concerned; and that upon foreclosure and sale, the sum due on the mortgage to C was the prior lien and should be first paid; secondly, the junior mortgage, and the surplus arising from the sale after satisfying both mortgages should be paid to C. *Fowler v. Fay et al.* 375.

4. If a senior mortgagee should purchase the mortgaged premises from the mortgagor and undertake to pay off a junior mortgage, and the amount of such mortgage is deducted from the price of the land, then the senior mortgage will be postponed in favor of the junior. *Ibid.* 375.

MORTGAGE UPON A VESSEL.

5. *Priority of lien over a material-man.* A prior mortgage on a vessel, duly recorded, has precedence of a lien of a material-man subsequently acquired. *Propeller Hilton v. Miller et al.* 230.

PRIORITY IN PAYMENT OF A SERIES OF NOTES.

6. *Lost by re-issue.* Where the mortgagor paid to the payees of a series of promissory notes given by the firm of which he was a member, those which had matured, with money which his brother had assisted him to raise by the loan of certain other notes under an agreement with the brother, unknown to the payees, that the brother was to have the notes when taken up assigned to him as a security for the notes he had parted with, and the payees, at the request of the mortgagor, indorsed in blank the notes so paid them without any knowledge that they were to be re-issued by the mortgagor, and they were transferred to the brother as agreed: *Held*, on bill by the payees to foreclose the mortgage as to the remaining notes of the series, falling due in one and two years after those which had been taken up and re-issued, that the latter were not entitled to priority, but were postponed. *White et al. v. Fisher et al.* 258.

7. Where one of the makers of a series of notes maturing in one, two, and three years, secured by his mortgage, paid the first of the series after due, taking a blank indorsement of them, and then transferred them to a brother, who furnished the means with which they were paid, the payees not knowing that their indorsement was procured for such

MORTGAGES. PRIORITY IN PAYMENT OF A SERIES OF NOTES. *Continued.*

purpose: *Held*, that the brother, as the holder of such notes, was entitled to the benefit of the mortgage security as against the mortgagor, but as to the holders of the remaining notes his rights were postponed. *White et al. v. Fisher et al.* 258.

MORTGAGOR AND MORTGAGEE.

8. *Of their respective rights and interests.* In equity, the mortgagor is the owner of the fee until entry for condition broken, or foreclosure. His relation to the mortgagee is peculiar. He has been termed a tenant from year to year, or at sufferance, or a quasi tenant at sufferance, or a tenant at will. While in possession he can not be regarded as a trespasser, without some act on the part of the mortgagee. *Medley et al. v. Elliott et al.* 532.

9. In equity, the mortgagee's interest in the mortgaged premises is of a personal character similar to his interest in the debt secured. It is a mere chattel interest. The mortgage is only a charge upon land, and, until foreclosure, or possession taken, it remains in the light of a *chose in action*. It is but an incident attached to a debt. *Ibid.* 532.

GRANTEE OF MORTGAGOR.

10. The mortgagor, while in possession, may rightfully sell or lease the premises. His grantee succeeds to his estate, occupies his position, takes subject to the incumbrance, and is subject to the same equities. His possession is not hostile to, or inconsistent with, the rights of the mortgagee, and he is not a trespasser; but the mortgagee, at pleasure, upon forfeiture of the condition, may treat either the mortgagor or his assignee in possession as tenant or trespasser. *Ibid.* 532.

11. A purchaser of part of the mortgaged premises from the mortgagor, after the release of all the rest of the premises, takes with the lien upon his hand exclusively. *Ibid.* 532.

SUBROGATION.

12. *Right of one of two mortgagors paying for the other.* When A and B, being equally interested in the purchase of land, gave their joint notes for the unpaid purchase money, secured by their mortgage on the premises, and B refused to pay \$800 of his part of the last note, so that the land of A (a partition having been made) was sold under decree of foreclosure, and he was compelled to redeem the same: *Held*, on cross bill of A, to a bill filed by B, that A was entitled to a decree against B for the amount so paid by him of B's part of the note, with six per cent. interest. *Fisher v. Dillon*, 379.

REDEMPTION FROM MORTGAGE.

13. *Of the terms thereof where mortgagee has acquired a tax title.* Where a party made a mortgage of land by a deed absolute on its face, and the mortgagee gave a bond obligating himself to convey back the premises on payment of the debt, free from all incumbrance, by deed with full
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MORTGAGES. REDEMPTION FROM MORTGAGE. *Continued.*

covenants of warranty, and afterward acquired a tax title to the premises, the court, on bill to redeem, allowed the mortgagee the sum advanced for the tax title, and required him to convey the whole title, which the mortgagee assigned for error: *Held*, that under the terms of his bond there was no error. *Clark v. Laughlin*, 278.

DECREE FOR POSSESSION ON FORECLOSURE.

14. A decree for the foreclosure of a mortgage, among other things, provided that if the premises, in case of sale, were not redeemed in fifteen months, the master in chancery execute a deed to the holder of the certificate of purchase, and requiring the delivery of possession to the grantee in such deed: *Held*, no error. *Baker et al. v. Scott*, 86.

INTEREST ON FORECLOSURE.

15. When a personal decree is rendered against a mortgagor for the balance of the debt remaining after the sale of the mortgaged premises, with interest, if the proceeds of sale shall not extinguish the interest accrued on the original debt, the court should see that interest is not allowed on interest. *Ibid.* 86.

CHATTEL MORTGAGES.

16. *For a greater indebtedness than exists—whether fraudulent.* The mere fact that the mortgage recites a greater indebtedness than actually existed at the time of its execution is not conclusive evidence of fraud. It is a fact to be left to the jury, who must determine from all the circumstances whether it was inserted in the mortgage with the design to shield the property of the mortgagor, and to hinder and delay creditors. The transaction must be real, and entered into in good faith to secure against present or future liability. *Bell v. Prewitt*, 361.

17. *Description of chattels.* A chattel mortgage duly acknowledged and recorded, after describing certain other chattels as then upon the farm of the mortgagor, contained this description, to-wit: "Twenty two-year old steers on same farm." It was objected that this description was insufficient to identify the property as to others dealing with the mortgagor: *Held*, that the record of the mortgage was sufficient notice to subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm, and that parol evidence was necessary and admissible to identify the particular cattle. *Ibid.* 361.

ASSIGNMENT OF MORTGAGE.

As distinct from the debt. See ASSIGNMENT, 2.

TAXES ON MORTGAGED PROPERTY.

Who should pay them. See TAXATION, 12.

PARTIES ON FORECLOSURE. See PARTIES, 3, 4.

OF AN EQUITABLE MORTGAGE. See CHANCERY, 10.

MUNICIPAL CORPORATIONS.

DEFECTIVE HIGHWAYS.

Liability for injury from excavation in street by an individual. See HIGHWAYS, 5.

GENERALLY. See CORPORATIONS, 6 to 9.

MUNICIPAL SUBSCRIPTIONS.

PROHIBITION UNDER NEW CONSTITUTION.

When the prohibition went into effect. See SUBSCRIPTIONS, 1.

MUNICIPAL TAXATION.

FOR CORPORATE PURPOSES. See TAXATION, 6 to 11.

NEGLIGENCE.

STREET RAILWAY COMPANY.

1. *Liability for death of a passenger caused by negligence.* It is the duty of a street railway company to carry their passengers with safety; and if the death of a passenger results from the carelessness of its servants in the management of its car, or from a defective track, or from an overloaded car, or from all combined, the company will be liable. *Chicago City Railway Co. v. Young, 238.*

NEGLIGENCE IN RAILROADS.

2. *Injury by fire from locomotive.* Where a railroad company suffered a heavy growth of dry grass to remain on its right of way through plaintiff's premises, and fire was communicated from the locomotive of a freight train, while laboring to ascend a heavy grade, to the grass and weeds in the right of way, and from thence communicated to the fences and grass of plaintiff, which was destroyed: *Held*, that the company was guilty of negligence, and that the plaintiff was entitled to recover. *Rockford, Rock Island & St. Louis Railroad Co. v. Rogers, 346.*

3. *In respect to the crossing of highways.* Railroad companies, under their charters, have the same right to use that portion of the public highways over which their track passes as other people have to use the same. Their rights and those of the people as to the use of the highways at such points of intersection are mutual, co-extensive, and reciprocal; and in the exercise of such rights all parties will be held to a due regard to the safety of others, and to the use of every reasonable effort to avoid injury to others. *Indianapolis & St. Louis Railroad Co. v. Stables, 313.*

4. It will be presumed that the servants of a railroad company having charge of its trains are cognizant of the road crossings along the line of their road; and when any such crossing is obviously a dangerous one, that the employees of the company knew such fact as well as that persons are liable at all times to be in the act of passing. *Ibid. 313.*

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

5. The degree of diligence and care required of railroad companies, it seems, is not fixed by any definite and precise rule, but depends rather upon the facts and circumstances of the case, so that what would be an unnecessary act in one case would be imperatively demanded in another. *Indianapolis & St. Louis Railroad Co. v. Stables*, 313.

6. It may be that there are places where it would be negligence to construct a road crossing over a highway without making a bridge for the latter over the railroad track; but at any rate the company must be held to a sufficiently high degree of diligence to overcome, as far as practicable, the danger. *Ibid.* 313.

7. The question of negligence is one of fact to be found by the jury. It depends, to a great extent, upon the surrounding circumstances of each case; and unless in case of gross acts of carelessness or failure to observe some positive requirement of law, the courts can not adopt any positive rule on the subject. *Ibid.* 313.

8. Where a railroad is so constructed that the place where it crosses a public highway is unusually dangerous to the traveling public, as where its track intersects the highway in a cut and is approached on the road by descending a hill, and persons approaching the crossing can not see the railroad track owing to brush and bushes until within a few feet of it, and then only a small portion of it, owing to a sharp curve: *Held*, that a neglect to sound the whistle or ring the bell, as required by the statute, under such circumstances, would be gross negligence. *Ibid.* 313.

9. And where a railroad track crossed a public highway at a place of unusual danger and peril to persons who might be passing over such crossing in the highway, and a person traveling over the same with his wagon and team was struck and injured by a passing train which was running at a rapid rate: *Held*, that the speed of the train might be considered in connection with the location of the roads and the other surrounding circumstances on the question of negligence. *Ibid.* 313.

10. *Failure to ring the bell or sound the whistle at crossings.* The law does not require a railroad company to ring a bell or sound a whistle at a farm crossing. *Toledo, Peoria & Warsaw Railway Co. v. Head*, 233.

OF CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

11. In cases of personal injury from negligence the well-established rule of this court is, that the plaintiff will recover even though he was negligent himself, if the negligence of the defendant was so much greater as when compared with that of the plaintiff that the negligence of the latter was slight. *Indianapolis & St. Louis Railroad Co. v. Stables*, 313.

12. The well-established rule of this court in regard to contributory negligence resulting in injury is, that the plaintiff may recover, not-

NEGLIGENCE. OF CONTRIBUTORY AND COMPARATIVE NEGLIGENCE. *Continued.*

withstanding he was himself negligent if his negligence is slight when compared with that of the defendant. *Indianapolis & St. Louis Railroad Co. v. Stables*, 313.

13. In this case the plaintiff, while in the act of crossing defendant's railroad at its intersection of the public highway, was struck by an engine of defendant, attached to a train, and received severe personal injury. The railroad was in a cut and was approached by defendant on the highway by descending a hill. When about sixty-five yards from the track he stopped his team, looked and listened for the train, and neither seeing nor hearing it he proceeded to cross. In approaching, the track was hidden from view by bushes and shrubs until within a few feet of it, and then only a small part of the track could be seen, owing to a sharp curve in it. It appeared that the train was running at an unusual speed. Plaintiff's horses became frightened and unmanageable so that they required his whole attention. It appeared that the statutory signal was not given before reaching the crossing: *Held*, that the defendant was guilty of gross negligence, and that even if any negligence was attributable to plaintiff, it was slight in comparison with defendant's. *Ibid.* 313.

14. In an action against a railroad company to recover for a personal injury to plaintiff on the ground of negligence in the servants of the defendant, the question is, through whose fault or negligence did the injury occur; and if the plaintiff was guilty of contributory negligence, was it slight in comparison with that of the servants of the defendant? If the negligence producing the injury is equal, or nearly so, or that of the plaintiff is greater than that of the defendant, he can not recover, but if his negligence was slight in comparison to that of the defendant, he may recover. *Chicago & Alton Railroad Co. v. Murray*, 426.

15. In such a case, where the vital question was the comparative negligence of the plaintiff with respect to that to be attributed to the servants of the defendant, and the evidence on this point was conflicting and difficult to resolve, the court in two instructions for the plaintiff substantially told the jury that if the defendant by its servants, the engineer and fireman of the engine that caused the injury, were guilty of negligence in managing the engine, then the defendant was liable for such negligence: *Held*, that the instructions in themselves were erroneous, and that although other instructions in the series given for the plaintiff and defendant stated the law of comparative negligence accurately, yet the objectionable ones were calculated to mislead the jury in such a case. *Ibid.* 326.

16. The plaintiff, working upon a bridge across defendant's railroad track, with knowledge of an approaching train, called to his little boy, eleven years old, to lead his horse across the track. In doing so, the horse, through fright, escaped and got upon the track and was killed

NEGLIGENCE. OF CONTRIBUTORY AND COMPARATIVE NEGLIGENCE. Continued.

by the train. The proof failed to show negligence in the company: *Held*, that a verdict against the railroad company for the value of the horse could not be sustained; that the plaintiff was guilty of great negligence on his part. *Toledo, Peoria & Warsaw Railroad Co. v. Head*, 233.

NEW TRIALS.

VERDICT AGAINST THE EVIDENCE.

1. To entitle the plaintiff to recover, he must establish his right by a preponderance of testimony. When the testimony of the plaintiff is expressly contradicted by that of the defendant, and defendant is corroborated by two other witnesses, a verdict for the plaintiff is not sustained by the evidence, and it is error to refuse a new trial. *Lincoln v. Stowell*, 84.

2. Where the testimony of the plaintiff in an action of trespass for personal injury is wholly unsupported as to the material facts, and is contradicted by the testimony of the defendant and several other disinterested witnesses as to such material facts, and no reason appears for rejecting or discrediting the testimony of the defendant and his witnesses, and the verdict of the jury can be supported on no other ground: *Held*, on appeal, that the verdict was against the weight of the evidence. *Smith v. Stocum*, 354.

3. It is the duty of a jury to find according to the weight of the evidence, and not capriciously on the testimony of a single witness who is a party to the suit, in opposition to the evidence of numerous other unimpeached and intelligent witnesses, who appear to have stated the details of the facts honestly as they saw and heard them. *Ibid.* 354.

4. It is an unwarranted assumption of power in a jury to reject the evidence of a great number of disinterested and unimpeached witnesses and found their verdict alone on that of an interested witness who is a party to the suit. Their verdict should be a just and fair conclusion from the whole evidence. *Ibid.* 354.

5. In all that class of cases sounding merely in damages, where the recital of the facts touch the sympathies or arouse the prejudices to such an extent as to obscure the understanding of the jury and prevent them from exercising their better judgment, it is the plain duty of courts to supervise their verdict and see that it is the conclusion of that deliberate judgment that ought to characterize all judicial proceedings, and not the result of passion or prejudice. *Ibid.* 354.

6. When there is no evidence at all as to any essential element of a cause of action or defense, or the verdict is manifestly against the weight of evidence, this court will interfere and set the verdict aside and grant a new trial. *Stenger v. Swartwout*, 257.

7. Unless a verdict is manifestly against the evidence, and is to be

NEW TRIALS. VERDICT AGAINST THE EVIDENCE. *Continued.*

attributed to the passion or prejudice of the jury, or to a misapprehension of the facts, the judgment thereon should not be disturbed. *Chicago City Railway Co. v. Young*, 238.

8. When the evidence is conflicting, it is the province of the jury to weigh it, and give credence to such portions as they believe to be true, and reject the balance; and in such a case their finding will not be disturbed unless it is manifestly against the evidence. *Bourne v. Stout*, 261.

CONFLICT OF TESTIMONY.

9. Where the whole case turns upon the evidence of a party to the suit, and that of an agent of the adverse party, and their testimony differs as to important facts, this court will not grant a new trial because the jury have given credit to the testimony of the agent. *Newlan v. Lombard University*, 195.

10. Where the only witnesses examined upon the point in issue are the two parties to the suit, and their testimony is flatly contradictory, the court will not undertake to say which witness the jury ought to have credited. *Reynolds v. McCormick*, 412.

11. When the testimony in respect to a material fact is contradictory, and can not be reconciled, as the jury have the advantage of judging from the manner, appearance, and interest of the witnesses, this court will not disturb their finding. *Robinson et al. v. Parish*, 130.

EXCESSIVE DAMAGES.

12. *In an action against a city to recover damages to the plaintiff's property*, it appeared the city had constructed a sewer terminating near a tract of about fifty acres of plaintiff's land, whereby the offal and filth of a portion of the city were discharged and flowed over part of the tract, cutting off about six acres; but the work, at the time of the trial, was so changed that it was no longer a nuisance, and it did not appear that plaintiff or his family had suffered any considerable annoyance; but the principal claim and proof of damage was based upon an assumption of an injury in being prevented from effecting sales of the lands for residences. The jury rendered a verdict for \$1,900 damages: *Held*, under the circumstances, to be grossly excessive, and ground for a new trial. *City of Jacksonville v. Lambert*, 519.

13. *In an action for personal injuries.* In an action on the case against a city railway company to recover damages for personal injury resulting from being ejected and thrown from a street car by the servants of the company, it appeared that the plaintiff got up immediately after he was thrown upon the ground, pursued and overtook the car, and walked a considerable distance the same evening; went to work the next day, as usual, and, when examined some days afterward, there was found no abrasion, contusion, or external injury; and the whole evidence failed to show that he had received any serious and permanent injury; and it

NEW TRIALS. EXCESSIVE DAMAGES. Continued.

- further appeared that at the time of the trial he had recovered to a considerable extent; and, even if the injury received was permanent, that it was not so serious as to disqualify him from business or earning a livelihood. The jury returned a verdict for \$12,000 damages: *Held*, that the damages were so grossly and glaringly excessive that a new trial should have been granted. *Chicago City Railway Co. v. Henry*, 142.

NOTICE.**IN JUDICIAL PROCEEDINGS GENERALLY.**

1. *Necessity of notice.* It is a principle that lies at the foundation of the administration of justice in all courts and tribunals, that a party to be concluded must be afforded an opportunity of being heard. *Leatie et al. v. Fischer*, 118.

IN THE MATTER OF SPECIAL ASSESSMENTS.

2. *Of notice in respect thereto.* See **SPECIAL ASSESSMENTS**, 3 to 6.

ESTABLISHING HIGHWAYS.

3. *Necessity of notice of meeting to hear reasons for or against.* See **HIGHWAYS**, 4.

MUNICIPAL CORPORATIONS.

4. *Liability for injury resulting from excavation in street by an individual—necessity of notice to municipal authorities.* See **HIGHWAYS**, 5.

PUBLICATION OF NOTICE IN ATTACHMENT.

5. *Requisites of the notice.* See **ATTACHMENT**, 2.
6. *Computation of time in publishing the notice sixty days.* Same title, 1.

ADMINISTRATOR'S SALE OF LAND TO PAY DEBTS.

7. *Of the notice of the application.* See **ADMINISTRATION OF ESTATES**, 3 to 7.

AS TO CLAIM OF HOMESTEAD.

8. *Possession by tenant—not notice to creditor.* See **HOMESTEAD**, 5.

DISPENSING WITH ONE'S SERVICES.

9. *Whether notice thereof should be given him.* See **CONTRACTS**, 4, 5.

OFFICERS.**CORONER'S DEPUTY.**

- May serve process.* See **CORONER**, 1.

ELISOR.

- Whether properly appointed.* See **ELISOR**, 1.

OUTSTANDING TITLE.

- FRAUDULENT DEED OF TRUST.** See **EJECTMENT**, 3.

PARENT AND CHILD.

RIGHT OF THE FORMER TO MAINTAIN ORDER IN HIS FAMILY.

Without being liable for trespass. See TRESPASS, 1, 2.

OF THE DISPOSING POWER OF THE MOTHER.

In an action of trespass to recover for personal injuries to a child, the alleged trespass being the placing of the child, by the defendant, in a buggy, and driving off with her, when the horse took fright and ran away, throwing out the child and causing the injury complained of, the defendant set up the permission of the mother to take the child: *Held*, the plea, which merely alleged the permission of the mother, without averring any authority or circumstance implying an authority on the part of the mother to give such permission, was defective, as the mother, as such, is entitled to no disposing power over the person of the child, the father being the person entitled by law to the custody of his child. *Pierce v. Millay*, 133.

PARTIES.

IN CHANCERY.

1. On bill in equity against an assignee to whom effects were assigned for the benefit of creditors, to have an indebtedness from the assignor set off against a judgment recovered by the assignee against the complainant, the proof showed that the debts against the assignor yet unpaid were inconsiderable in amount, and that there was an abundance of assets in the hands of the assignee to pay them: *Held*, that it was unnecessary to reverse the decree in order that those other creditors might be made parties. *Barton v. Mosher*, 237.

2. Where a bill in equity to set aside a tax deed showed that the purchaser at the sale had parted with all his interest to one of the defendants, it was held that an objection that such purchaser was not made a party defendant, was not well taken. *Reed v. Moffatt et al.* 300.

3. *On foreclosure.* Where the mortgagor, in his life time, has sold and conveyed the mortgaged premises, his heirs are not necessary parties to a bill to foreclose the mortgage, they having no interest in the land to be affected. *Medley et al. v. Elliott et al.* 532.

4. On bill to foreclose a mortgage executed by a husband alone to secure the payment of purchase money, his wife is neither a necessary nor proper party defendant. *Baker et al. v. Scott*, 86.

CHANGE OF NAME OF CORPORATION.

5. *After receiving the note sued upon.* Where a promissory note was given to the Illinois Liberal Institute, whose name was subsequently changed, by an act of the legislature of this State, to that of Lombard University, the act authorizing the institution by its new name to sue for and collect all demands: *Held*, a suit on such note was properly brought in the new name. *Newlan v. Lombard University*, 195.

PARTIES. *Continued.*

NON-JOINDER OF SECRET PARTNER.

Not pleadable in abatement. See ABATEMENT, 1.

WHO MAY CONTEST A WILL. See WILLS, 19.

PARTNERSHIP.

WHETHER IT EXISTS.

1. *As to third parties.* Where a person holds himself out as a partner to a party giving credit to the supposed firm, and by his conduct or declarations induces such person to give credit in the honest belief that he is a partner, he will be held liable as a partner. *Poole et al. v. Fisher et al.* 181.

PAYMENT.

WHAT AMOUNTS TO A PAYMENT.

1. *As distinguished from a transfer of the debt.* Where the makers of a series of notes procured from a third party the means with which to pay the notes then due, under an agreement that the same, when paid, should be transferred to such third party, and the payees on payment, at the request of the makers, indorsed such notes in blank and surrendered them to the makers, by whom they were delivered to the third party, the payees not knowing that they were to be re-issued: *Held*, that so far as the payees were concerned, this was not a transfer of the notes, but simply a payment. *White et al. v. Fisher et al.* 258.

2. In such a case the transaction could not be treated as a purchase by the makers for the third party, except on satisfactory proof that the fullest explanation was made to the holders of the notes, and that they understood it to be a sale to some third party. *Ibid.* 258.

PLEADING.

OF THE DECLARATION.

1. *In suit by a town against an individual to recover for injuries resulting from an excavation in a street by the latter.* Where a town, when sued by a person for an injury received from falling into a pit dug by a party in the street, in front of his premises, settled the claim of the injured party by payment of \$300 before any judgment, and without any notice to the party creating the nuisance, and then brought an action on the case against such party to recover the sum so paid, the declaration containing no allegation that the town had any notice of the nuisance, or statement of any facts from which notice might have been inferred or implied: *Held*, that the declaration was bad on general demurrer. *Fahey v. Town of Harvard*, 28.

2. In such a case, before the town is entitled to recover of the wrongdoer the sum so paid, it must show by the pleadings and proof that the town was legally liable to the injured party. *Ibid.* 28.

PLEADING. *Continued.*

WHEN THE PLAINTIFF MAY DECLARE GENERALLY.

Where there is an express contract. See PLEADING AND EVIDENCE, 8.

WHETHER PLAINTIFF MUST DECLARE SPECIALLY. See PLEADING AND EVIDENCE, 5, 6, 7.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOF.

1. *As to designating parties in the singular or plural number.* A declaration upon an arbitration bond, which was executed by a party to the arbitration and his security, stated that the said plaintiff and the said defendants, described in said bond and the condition thereof, entered into an agreement to arbitrate. The condition of the bond recited that the plaintiff and only one of the defendants sued had entered into the agreement: *Held*, that an objection to the bond on the ground of variance was properly overruled, *Noyes v. McLaflin*, 474.

2. Where the words plaintiff or defendant are used in the plural or singular number, they will be regarded as being used in the number which the context shows was intended. *Ibid.* 474.

3. *As to amount of recovery.* A declaration for a specific sum, averring that the amount has reached the defendant's hands to the use of the plaintiff, is good for any portion of the sum which may be proved. *Tuttle v. Ridgeway*, 515.

4. *Of a contract to effect a sale to another.* An allegation is a declaration, of a contract, that if the plaintiff would bring about and effect a sale for defendant of his lumber-yard and materials, defendant would permit plaintiff to retain one-third interest in the premises and materials, and, in addition thereto, would give him one-third of one-half for effecting the sale, it seems, is not sustained by proof that defendant offered plaintiff if he would make sale of two-thirds of the concern, he would retain one-third and give plaintiff one-half of that, for selling the other two-thirds, and that plaintiff might account for the rest. The pleading and proof is variant. *Lincoln v. Stowell*, 84.

RECOVERY UNDER THE COMMON COUNTS.

5. *Or whether the plaintiff must declare specially.* Where goods are to be paid for by bill of exchange, or promissory note, and the defendant has refused to give it, if the suit is brought before the expiration of the credit, the plaintiff should declare specially. *Van Horn et al. v. Burroughs et al.* 388.

6. But where work is done under an agreement to extend the time of payment to a given time, upon condition that a note shall be given bearing interest, upon the completion of the work, a failure to give the note will authorize the bringing of suit at any time thereafter, and in such case the plaintiff need not declare specially. *Ibid.* 388.

PLEADING AND EVIDENCE. RECOVERY UNDER THE COMMON COUNTS.
Continued.

7. In a suit upon a note purporting to be executed by A and B there was no service or appearance by A. B denied the execution of the note, verified by his oath, and the proof showed that he never did execute it. The proof further showed that the payee of the note sold A a mare on condition that B would sign a note with A to him for the price, and that B had said he would sign it: *Held*, that this was not an original undertaking of B for the purchase and payment of the mare, and that plaintiff could not recover the price of the horse of B under the common counts. *Cox v. Strasser*, 383.

8. *Where there is an express contract.* While it is true that there is no liability by implication of law upon an express contract, executory in its provisions, yet where there has been full performance, and nothing remains to be done but the payment of the money; or where there has been only part performance, and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had for the contract price of the service performed, under an *indebitatus assumpsit*. *Catholic Bishop of Chicago v. Bauer*, 188.

POSSESSION.

AS BETWEEN LANDLORD AND TENANT.

Of the crops raised by the tenant, where the landlord reserves the property in them as security—right of possession. See **LANDLORD AND TENANT**, 4.

PRACTICE.

DECLARATION BEFORE SECOND TERM.

1. Where the plaintiff's summons was made returnable to the November term, 1870, of the circuit court, which was, in fact, served within ten days before that term, but no indorsement of service was made until Feb. 7 following, the commencement of the second term after suit brought, and the court dismissed the suit on motion of the defendant because no declaration had been filed ten days before the second term: *Held*, that the dismissal was proper. *Howell et al. v. Albany City Insurance Co.* 50.

TIME FOR MAKING CERTAIN OBJECTIONS.

2. *Generally.* It is a rule of general application in courts of law that if a party acquiesces in the mode of conducting a cause by his adversary, by failing to object and except in apt time, then whether the objection pertain to the introduction of evidence, the measure of damages, or instructions to the jury, he will be precluded from raising it in the appellate court. *Kankakee & Illinois River R. R. Co. v. Chester*, 235.

3. *As to the mode of assessing damages for right of way.* In a proceeding to condemn a strip of land for a right of way by a railroad company through a party's farm, consisting of several tracts, both parties, on the

PRACTICE. TIME FOR MAKING CERTAIN OBJECTIONS. *Continued.*

trial, treated the farm as a single tract in their examination of witnesses and instructions, and the jury fixed the compensation and the owner's damages as upon one tract. Upon appeal, the company, for the first time, objected that the finding should have applied to each tract separately: *Held*, that the objection could not be urged for the first time in the appellate court. The question could not even be raised on motion for a new trial. *Kankakee & Illinois R. R. Co. v. Chester*, 235.

4. *That an infant appeared by attorney.* The defendant in a suit at law appeared by attorney, and on the trial it appeared incidentally that the defendant was an infant. The question of infancy was not raised in the court below. On error, it was objected, for the first time, that the appearance should have been by guardian: *Held*, that a motion should have been made in the circuit court to set aside the verdict and judgment on that ground, as an error of fact, when evidence could have been heard on both sides, and the decision of the court thereon might then be reviewed. *Mains v. Coener*, 465.

5. *Whether the proceedings in attachment of a vessel show jurisdiction in the court below—objection should be made in that court.* See **ATTACHMENT OF BOATS AND VESSELS**, 5.

REJECTING MERELY CUMULATIVE EVIDENCE.

6. *Not error.* Where a plaintiff has already proved a certain fact which is not disputed by the defendant, it is no error to reject other proof to the same effect. *Reynolds v. McCormick*, 412.

ADMITTING FURTHER EVIDENCE.

7. *After the argument has commenced.* It is purely a matter of discretion with the court trying a case whether it will admit new or further evidence after the testimony has been closed and the argument commenced. *Goodrich v. City of Minonk*, 121.

OF THE ORDER OF INTRODUCING TESTIMONY.

8. Under our practice a party has the right to introduce his evidence in the order he may prefer, provided he will connect it, and thus render it material to the issue. Thus, he may first show the acts and statements of one claiming to be an agent, to bind the principal, if he will follow it with proof of the agency, and show that the agent's acts were within the scope of his authority. *Mix v. Osby*, 193.

JURY TAKING MATTERS IN EVIDENCE TO THEIR ROOM.

9. Where a hotel register was given to the jury by consent, in order to prove the handwriting of defendant by comparison with the signature of the note sued on, and examined by the jury: *Held*, no error to refuse to permit the jury to take the register in their retirement, as it was not evidence of itself. *Cox v. Straisser*, 383.

VACATING A JUDGMENT.

10. *To let in parties not served, to defend.* See **JUDGMENTS**, 2, 3, 4.

PRACTICE IN THE SUPREME COURT.
WHO MAY COMPLAIN OF ERROR.

1. Where the court, in modifying an instruction asked by the defendant, merely employed the language of the defendant used in another of his instructions, it was *held*, although the instruction as thus given was erroneous, the defendant could not be allowed to complain. *Pierce v. Millay*, 133.

ERROR WILL NOT ALWAYS REVERSE.

2. *Exclusion of proper testimony.* The defendant in a suit brought to recover damages on the ground of false and fraudulent representations made by him in effecting a sale of certain lands to plaintiff, testified that he bought the land of one H, and was then asked, "How much did H tell you was prairie, and how much timber, at the time you purchased of him?" The court sustained plaintiff's objection to the question. It appeared that this took place about eleven years before the sale to plaintiff, and defendant's representations as to the character and quality of the land from personal knowledge acquired about three years before the sale: *Held*, that while the statements of H to defendant might not have been altogether irrelevant as affecting defendant's honest belief of the condition and quality of the land sold to plaintiff, and, therefore, admissible, yet its weight as evidence was so light, in view of the other facts, that its rejection could not be looked upon as a substantial error. *Drew v. Beall*, 164.

3. *Of improper instructions.* Where the court instructed the jury there was no evidence of a material fact involved, and there was evidence admitted on the point, which this court deemed wholly insufficient to establish the fact: *Held*, that, as the error worked no prejudice, it was no ground for reversal. *Stobie et al. v. Dills*, 432.

4. *Refusing a continuance.* Where a complainant made a substantial amendment to her bill, the defendant moved for a continuance on that ground, which the court overruled: *Held*, on appeal, when it appeared that the cause was afterward continued by the expiration of the term, the error did no injury, and furnished no ground of reversal. *Baker et al. v. Scott*, 86.

PRESUMPTIONS.**OF LAW AND FACT.**

1. *When a bill of exceptions fails to state that it contains all the evidence—presumption.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2.

2. *As to jurisdiction of probate court in granting letters of administration.* See ADMINISTRATION OF ESTATES, 2.

3. *As to negligence of bailee.* See EVIDENCE, 5.

4. *As to the authority of an attorney.* See ATTORNEY AT LAW, 1, 2.

5. *As regards the sanity of a person.* See INSANITY, 1, 2, 3.

PRINCIPAL AND AGENT. See AGENCY.

PRIVILEGED COMMUNICATIONS. See LIBEL, 1.

PROBABLE CAUSE. See MALICIOUS PROSECUTION, 1, 2, 3.

PROCESS.

RETURN OF SHERIFF.

1. *After expiration of office.* A sheriff after the expiration of his term of office may amend or make a return of service of process duly performed by him while in office, when the service is recent. *Howell et al. v. Albany City Ins. Co.* 50.

2. *Construction.* An officer's return of service of a summons in chancery issued against A and B was "served by delivering a copy of the within writ to A and B, this 15th day of September, 1870:" *Held*, that it showed a service on each defendant by copy. *Reed v. Moffatt et al.* 300.

WHAT OFFICERS MAY SERVE PROCESS. See ELISOR, 1; DEPUTY, 1.

PROMISSORY NOTES.

DEMAND NOT NECESSARY.

1. Where a promissory note is made payable at a specified time and place, it is not necessary for the payee to make a demand of payment at the time and place specified in order to maintain an action upon the note, or a bill to foreclose a mortgage executed to secure the payment of the note. *Neaton et al. v. Berney*, 61.

READINESS TO PAY—INTEREST.

2. But if in such case the maker of the note is at the place of payment at the time designated, and is ready and offers to pay the money, but can not because the note is not there ready to be surrendered, such readiness and offer on the part of the maker will discharge him from liability to pay interest accruing after the maturity of the note. *Ibid.* 61.

3. *State of war—effect on accruing interest.* So, where a note executed in the year 1857 was made payable at a specified time and place in the city of Chicago, and at the time the note became due the payee resided in the then rebellious States of the Union, and had the note there in his possession, it was *held*, that the fact of the existence of a state of war would not relieve the makers who resided within the Union lines from the payment of interest on the note accruing after its maturity and during the existence of hostilities, as no legal obstacle was in the way of their being at the time of payment at the place designated, the same being within the Union lines, and offering to pay the note, thus relieving themselves from liability to pay such interest. Such readiness and offer to pay would have been no breach of duty toward their government. Nor did the fact of the existence of hostilities between the

PROMISSORY NOTES. READINESS TO PAY—INTEREST. *Continued.*

United States Government and the confederate *de facto* government relieve such of the makers of the note as resided within the confederate lines from liability to pay such interest, as no legal obstacle was in the way of their paying the note there to the payee, the latter also residing there and having the note in his possession. *Yeaton et al. v. Berney*, 61.

PURCHASERS.

CONVEYANCE SUBJECT TO A MORTGAGE.

1. *Whether purchaser liable to pay the mortgage.* Where a party receives a warranty deed containing a clause that it is made subject to a mortgage given upon the land by the grantor to a third party, this will create no personal liability on the part of the grantees to pay the outstanding incumbrance, unless he has specially agreed to do so, or the amount of the incumbrance has been deducted from the purchase price. The effect of such clause is to make the land the primary fund as between all the parties for the payment of the debt. *Fowler v. Fay et al.* 375.

ADMINISTRATOR BUYING AT HIS OWN SALE.

2. Where an administrator is the real purchaser at a sale of land by him for the payment of the debts of his intestate, by procuring another to bid off the land for his benefit, and such nominal purchaser, shortly after receiving a deed, conveys the premises to the administrator, a court of equity will set aside the sale on the application of the heirs. *Williams v. Walker et al.* 517.

PURCHASER AT JUDICIAL SALE.

3. *Effect of subsequent reversal.* The law is well settled on grounds of public policy, that the rights of persons, not parties to the record, or privies, acquired under judicial sales, when the court had jurisdiction, will not be affected by a subsequent reversal of the decree or order under which they were acquired. *Hobson et al. v. Ewan*, 146.

RAILROADS.

CONSOLIDATED RAILROADS.

1. *Liability for debts of original companies—under act of 1867.* The act of 1867, which provides that, in case of consolidation of two or more railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but was designed to apply to companies which might consolidate after its passage. *Hatcher v. Toledo, Wabash & Western Railroad Co.* 477.

2. *Liability for debts by subsequent legislation.* A railroad company being authorized by its charter to borrow money and secure its payment by mortgage or deed of trust of its road, property, and income, but not of its franchise, executed a deed of trust on its road, property, rights, and franchise, under which the trustees sold and conveyed the same to

RAILROADS. CONSOLIDATED RAILROADS. Continued.

certain parties, who organized a new company under the old name. Subsequently, a special act of the legislature was passed authorizing the president of the old company to transfer the corporate franchise to the purchasers, which he did, and the old corporation ceased to exist: *Held*, that the purchasers at the trustee's sale having acquired a valid title to the property of the corporation without liability for any of its debts which were not a prior lien, their rights could not be taken away or impaired by subsequent legislation; and having consolidated with another company prior to the act of 1867, the consolidated company was not liable for the debts of the first-named corporation. *Hatcher v. Toledo, Wabash & Western Railroad Co.* 477.

CURATIVE LEGISLATION.

3. *To render valid acts of a company, done without authority.* Where a railroad company has made a mortgage or sale of its corporate franchise, without authority in its charter, the same may be ratified and rendered valid by subsequent legislative enactment. The right to object to such transfer is one affecting the public alone, which the legislature, as the representatives of the people, may waive by a subsequent act. *Ibid.* 477.

4. Thus a railroad company not authorized to incumber or transfer its corporate franchise, executed a deed of trust on its road, property, rights, and franchise, under which the trustee sold and conveyed the same. The president of the company, under a subsequent act for that purpose, transferred the corporate franchise to the purchasers; *Held*, that even if the franchise could not be transferred without the consent of the legislature, it might be subsequently given; and that the State having assented to the sale of the franchise, no other party could interfere. *Ibid.* 477.

SALE OF FRANCHISE UNDER EXECUTION.

5. It seems that without legislative authority, the franchise of a railroad company can not be subjected to sale on judgment and execution for its debts. *Ibid.* 477.

RATIFICATION.**AS TO A FORGED SIGNATURE.**

1. One whose name has been attached to a note as surety, without authority becomes liable, if, upon inspection, he admit the signature to be his. After such admission he is estopped from denying the making of the note. *Hefner v. Vandolah*, 483.

2. Nor is it necessary, to establish a ratification, that there had been any previous agency created. An act wholly unauthorized may be made valid by a subsequent ratification. *Ibid.* 483.

3. A person who has signed several notes of like character, and, who under a mistake admits the signature of one, especially if not shown him, is not estopped from his plea denying his signature. *Ibid.* 483.

RECEIVER.

THE COURT SHOULD DISTRIBUTE THE FUND.

1. On bill against an insolvent insurance company, filed by creditors, the court appointed the master in chancery receiver, and directed him to collect the debts owing to the company, and apply the proceeds in payment of complainants' judgments: *Held*, that the decree was too broad. It should have directed the proceeds to be brought into court, so that the court might distribute it to the creditors entitled. *Bennesson v. Bill et al.* 408.

WHO MAY ACT AS RECEIVER.

2. *As to master in chancery.* Ordinarily, the appointment of a receiver is a matter of discretion; but there are persons, who, owing to their position, are not usually competent to act as such. A party to the suit is not, unless by consent of both parties. And a master in chancery, being an officer of court, whose duty it is to pass upon the accounts, and check the conduct of a receiver, is disqualified from being appointed receiver. *Ibid.* 408.

RECOGNIZANCE.

CONTINUANCE OF A PRELIMINARY EXAMINATION.

1. *Whether the recognizance is thereby discharged.* A party charged with larceny, having undergone a partial preliminary examination, was recognized to appear before the justice "on the second day of February, A. D. 1869 * * * and from day to day thereafter until discharged by order of the court," for the purpose of a further examination. The accused appeared on the 2d of February at the time appointed, when one witness was sworn and the prosecution continued until the 6th of February without any new bond. The accused failed to appear on the 6th, and the justice then made the following entry: "Defendant did not appear, so the court considered that the bond of recognizance be forfeited," etc.: *Held*, the accused having appeared on the day fixed in the recognizance, and thus complied with its condition, the justice had no right to enter a default for his non-appearance on the 6th, and a *scire facias* issued on such default was void. *Ogden et al. v. The People*, 63.

REDEMPTION.

FROM SALE UNDER EXECUTION.

1. *By a judgment creditor—where the judgment was fraudulent.* Where the owner of an equity of redemption transferred the same to hinder and delay creditors, and afterward gave a note with a power to take judgment against him by confession, to enable a third party to levy upon and sell the land and redeem the same, and there was no consideration whatever for the note, and the holder of the note after judgment, levy, sale, and sheriff's deed for the land, filed his bill to avoid the transfer of the equity of redemption for fraud, and to redeem from

REDEMPTION. FROM SALE UNDER EXECUTION. *Continued.*

the debtor's deed of the land given in the nature of a mortgage: *Held*, that as the note, which was the foundation of the judgment, was given in bad faith and without consideration, there was no debt, and consequently the judgment could form no basis in equity for the redemption. *Arnold et al. v. Gifford*, 249.

2. The fact that a debtor confesses judgment in favor of a creditor for the express purpose of enabling the latter to redeem, will not invalidate the redemption, if there be no fraud in the consideration; but where judgment is confessed or procured where no debt, in fact, exists, and it is done in bad faith and fraudulently, the party seeking to redeem under such judgment, being a mere volunteer, and a party to a fraudulent plan, will receive no aid or assistance in a court of equity. *Ibid.* 249.

REDEMPTION FROM A MORTGAGE.

3. *Of the terms thereof where the mortgagee has acquired a tax title.* See MORTGAGES, 13.

REMEDIES.**DISTURBANCE OF EASEMENT.**

Where unity of seisin of a building is severed—remedy where one of the purchasers attempts to disturb an easement. See INJUNCTIONS, 2, 3.

REPLEVIN.**WHEN THE ACTION WILL LIE.**

1. Where liquors were seized under a city ordinance which was void, the action of replevin will lie for their recovery. *Sullivan v. Stephenson et al.* 290.

PLEA OF PROPERTY IN DEFENDANT.

2. In replevin, the plea of property in defendant is mere inducement to the formal traverse of the right of property in the plaintiff. It is not even traversable. *Reynolds v. McCormick*, 412.

3. Under such a plea the issue to be tried is not whether the property is in the defendant, but whether the right of property and the right to immediate possession is in the plaintiff. On such an issue the plaintiff must recover on the strength of his own title, and the burden of proof is on him to establish his right. *Ibid.* 412.

EFFECT OF VERDICT ON TITLE.

4. In replevin, where the defendant pleaded property in himself, and the proof showed that he owned the property jointly with the plaintiff: *Held*, that a verdict for defendant on such issue did not determine judicially that the property was that of defendant exclusively, and that such finding did not affect plaintiff's right to recover the undivided half. *Ibid.* 412.

REPLEVIN. *Continued.*
RETURN OF PROPERTY. .

5. Where the plaintiff sought to recover possession of property in an action of replevin, claiming to be the exclusive owner thereof, and the defendant pleaded property in himself, the proof showing that the property was owned in partnership by the plaintiff and defendant: *Held*, no error for the court to award a return of the property to defendant on a verdict finding such issue in favor of defendant. If the property was, in fact, partnership property, the possession of either was lawful. *Reynolds v. McCormick*, 412.

BY ONE PARTNER AGAINST ANOTHER.

6. It seems that where property is owned by two persons jointly as partners neither can maintain replevin against the other for the exclusive possession. *Ibid.* 412.

RETURN UPON PROCESS. See **PROCESS**, 1, 2.**REVERSAL.****PURCHASER AT JUDICIAL SALE.**

Not affected by subsequent reversal of the judgment or decree. See **PURCHASERS**, 3.

REVIVOR OF SUIT.**DEATH OF SOLE PLAINTIFF IN EJECTMENT.**

Revivor in names of a part of the heirs. See **EJECTMENT**, 1, 2.

RIGHT OF WAY.**CONSTITUTION OF 1870, AND THE ACT OF 1852.**

1. *Compensation—trial by jury.* The 13th section of the Bill of Rights of the constitution of 1870, placing restrictions upon the exercise of the right of eminent domain, is not merely prospective in its effect, but operated in *presenti*, without legislative action. *The People ex rel. v. McRoberts*, 38.

2. It provides that private property shall not be taken or damaged for public use without just compensation; and that such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The requirement that the compensation shall be ascertained by a jury is affirmative in its character, and must imply an exclusion of any other mode of fixing the compensation. If there was no law under which a jury could be impaneled for the ascertainment of such compensation, and the legislature neglected to provide one, the constitution would not, for that reason, be in abeyance; but until such law was provided, the right of eminent domain could not be exercised. *Ibid.* 38.

RIGHT OF WAY. CONSTITUTION OF 1870, AND THE ACT OF 1852. *Continued.*

3. The compensation for property damaged, as well as taken, must be ascertained by a jury. It can be neither damaged nor taken without compensation; and there can be no entrance upon or possession of land for public use until the compensation for the land damaged, as well as taken, has been paid. *The People ex rel. v. McRoberts*, 38.

4. The first six sections of the Act of June 22, 1852, which provides for the filing of a petition, due notice to the persons interested, the appointment of commissioners, their inspection of the premises, and a report of the compensation assessed by them to be filed with the clerk of the Circuit Court, are in no sense in conflict with the constitution of 1870. *Ibid.* 38.

5. But the 7th section, which makes the decision of the commissioners conclusive upon the parties before they can have the benefit of a trial by jury, is inconsistent with the letter of the constitution. The assessment and report of the commissioners should conclude no owner of the land, and confer no right upon the corporation, unless the land owner assents, by an acceptance of the compensation, or in some other manner. *Ibid.* 38.

6. So Section 9, which requires the execution of a bond upon taking an appeal from the decision of the commissioners to the Circuit Court, is clearly annulled by the new constitution. *Ibid.* 38.

7. And section 12, which permits the land to be entered upon during the pendency of the appeal, is manifestly inconsistent with the Bill of Rights. *Ibid.* 38.

8. But there is enough of the act which is not inconsistent with the constitution to enable private property to be taken for public use. The commissioners may act, and, after notice of the filing of their report, parties may bring the proceedings before the Circuit Court, as provided in sections 10 and 11 of the act. If satisfied with the report, and the compensation fixed, the latter may be accepted, and then an adjustment can be made by those who are competent to act. If the report is not satisfactory, then notice should be given to the opposite party, as provided in the sections referred to, so that a trial can be had in the Circuit Court. *Ibid.* 38.

COSTS.

9. But the party whose land is sought to be taken ought not to be compelled to pay costs if the assessment of the commissioners should be affirmed or not increased. *Ibid.* 38.

ASSESSMENT OF DAMAGES.

10. *Whether excessive.* Where the land sought to be taken by a railroad company for right of way, situate in the limits of the city of Peoria, was over ten acres and twenty-five witnesses sworn estimated the

RIGHT OF WAY. ASSESSMENT OF DAMAGES. *Continued.*

damages to the land owner at various sums, ranging from \$1,800 to \$18,000, and the jury assessed the damages at \$5,500: *Held*, that the damages were not excessive. *Peoria & Rock Island Railway Co. v. Birkett*, 332.

11. *Finding as to fencing.* On a proceeding to condemn land for right of way by a railroad company, the jury, in their verdict, found the value of the land taken at \$3,000, and the damages, aside from the value of the land taken, to the land owner, over and above the benefits, at \$2,500, making in all \$5,500. It was objected that the verdict was defective in making no reference to the fencing, and keeping the same in repair. It was held that as there was no proof as to the fencing, the jury could not find a verdict as to its cost. *Ibid.* 332.

12. While it is true that, in a proceeding to assess damages for a right of way for a railroad company, the cost of erecting and maintaining fences along the line of the proposed road is proper to be considered by the jury as an element of damages, yet when no proof is offered on the subject, the jury will not be required to find in their verdict any thing in respect to it. *Ibid.* 332.

13. *Of the fee simple title.* Where a proceeding was commenced to condemn land by a railroad company previous to the adoption of the present constitution, under a charter which gave the land appropriated in fee simple to the company, but the assessment of damages was had after the adoption of the present constitution, it was held that the rights of the parties were to be decided under the charter, and that an instruction telling the jury that the company acquired no title to the land, and that they should consider such fact in assessing damages, was properly refused. *Ibid.* 332.

14. *Future damages from changes.* A railroad company condemning land for its right of way must construct its road as indicated by its maps and plans introduced upon the trial of the question of damages. A subsequent alteration will give the land owner a right to recover for damages resulting therefrom. *Ibid.* 332.

15. *Mode of arriving at a verdict by the jury.* On an assessment of damages for right of way, where there was a great difference in the estimates of the witnesses, the court was asked to instruct the jury, 1st, that they had no right to take an average of the testimony, and then told them they had no right to set down and add up the amounts sworn to by each witness, and then divide by the number of the witnesses, which was refused: *Held*, that the latter part of the instruction might properly have been given if asked alone, but taken with the first clause, was properly refused as erroneous, and calculated to mislead. *Ibid.* 333.

16. A jury may always take an average of testimony, if properly done, by a consideration of all the elements and circumstances which are referred to in the law as proper to aid in determining the weight of

RIGHT OF WAY. ASSESSMENT OF DAMAGES. Continued.

evidence; and they should never be told that they have or have not the right to average the testimony, without explanation. *Peoria & Rock Island Railway Co. v. Birkett*, 332.

17. A jury, in assessing damages for right of way, have no right to take the gross amount as sworn to, and divide it by the number of the witnesses to obtain the result of their verdict, unless there is afterward full and free consultation, and their judgment assents to it, uninfluenced by any previous agreement. *Ibid.* 332.

RULE IN SHELLY'S CASE. See **WILLS**, 28 to 33.

SEDUCTION.

EVIDENCE IN AN ACTION THEREFOR. See **EVIDENCE**, 20, 21.

SHELLY'S CASE, THE RULE IN. See **WILLS**, 28 to 33.

SLANDER.**OF THE QUESTION OF MALICE.**

1. The law implies malice from the publication of actionable words, but this implication may be explained and rebutted by the circumstances. *Zuckerman v. Sonnenschein*, 115.

2. In a suit for slander it is error to instruct the jury that if the defendant used words imputing a crime, they must find for plaintiff, when the words were spoken under circumstances tending to show a want of malice. In such case the intent of the publication should be left to the jury under the proof. *Ibid.* 115.

3. When words imputing the commission of a crime are used by the defendant merely for the purpose of translating the language of another from the German into the English language at the request and for the information of an attorney at law in a matter of business, the law will not infer malice in the defendant. Under such circumstances the use of the words may properly come within the range of privileged communications. If there was malice in fact it must be left to the jury to be found from the evidence. *Ibid.* 115.

SPECIAL ASSESSMENTS.**LANDS NOT ADJOINING IMPROVEMENT.**

1. *Whether subject to special assessment.* Under the act of 1854, providing the mode of collecting assessments of cities and towns for certain purposes, the corporate authorities of towns have the power to assess real estate for benefits it may derive by ditching and tilling a street, although it may not adjoin the ditch. *Goodrich v. City of Milton*, 121.

UNIFORMITY OF ASSESSMENT.

2. On application for judgment against certain land for the sum as

SPECIAL ASSESSMENTS. UNIFORMITY OF ASSESSMENT. *Continued.*

assed for benefits from improving a ditch near the same, the owner objected that other land through which the ditch passed was not assessed, and offered to prove that such land was benefited by the ditch: *Held*, that proof that such other land was benefited by the original ditch was irrelevant, the assessments being made only for leveling and improving the same. *Goodrich v. City of Minonk*, 121.

NECESSITY OF NOTICE.

3. *Of making the assessment.* On an application for judgment in favor of the city of Chicago, by the city collector, against lands to enforce collection of a special assessment made for the purpose of widening a street, no competent proof of the notice of making the assessment appeared in the proceedings put in evidence, nor was there any extrinsic proof of such fact: *Held*, that the want of such proof was fatal to the judgment on appeal. *Honore v. City of Chicago*, 305.

PROOF OF NOTICE BY COMMISSIONERS.

4. *Of the manner thereof.* The act of 1854, relating to assessments by cities and towns, authorizes the town or city council to fix by ordinance or resolution the time and kind of notice of assessments; and when a town ordinance prescribed the form and kind of notice, and required the commissioners to attach to the assessment roll an affidavit of the giving of such notice, it is not error to receive such affidavit in evidence to prove the posting of notices of the meetings of the commissioners. *Goodrich v. City of Minonk*, 121.

PUBLICATION OF NOTICE.

5. *Of the certificate.* The certificate of publication of the commissioner's notice of their meeting to make a special assessment in the city of Chicago, and of the notice of application for confirmation of the assessment, is fatally defective if it omit to state the dates of the first and last papers containing such notices, or language equivalent thereto. *Brown et al. v. City of Chicago*, 106, 289; *Marsh et al. v. City of Chicago*, 115.

NOTICE OF APPLICATION FOR JUDGMENT.

6. In this case it was objected that the collector's notice of the application for judgment was deficient, in not stating that an order of sale would be asked. There was, however, personal notice to the land owner of the application for judgment, and he appeared and filed objections. This was held sufficient to give the court jurisdiction. *Goodrich v. City of Minonk*, 121.

WHO MAY APPLY FOR JUDGMENT.

7. *Under the new constitution.* The authority of a city collector to apply for judgment on special assessments is abrogated by the new constitution. *Brown et al. v. City of Chicago*, 106; *Marsh et al. v. City of Chicago*, 115.

Also, see **TAXATION**, 13, 14, 15.

SPECIAL ASSESSMENTS. Continued.**OF A PRIOR ASSESSMENT, IN BAR.**

8. On application for judgment against certain lots to enforce collection of a special assessment for opening a street, it was urged that the ordinance under which the assessment was made, was void on account of a prior proceeding for opening the street, and making an assessment therefor, which was claimed to be valid. The lot owner did not show that a warrant had ever issued on the first assessment: *Held*, that he should have introduced the record, showing that the first assessment was in conformity with the statute; because if there was not a valid confirmation of a valid assessment, it was not conclusive upon the city. *Forsythe v. City of Chicago*, 304.

OF A PREVIOUS OPENING OF A STREET.

9. *As a defense against an assessment for opening it.* Upon the application of the city collector of Chicago for judgment upon a special assessment warrant for the opening of a certain street, sixty-six feet wide, under an objection to the recovery of the judgment, evidence was introduced showing that the same street had been opened to the width of sixty feet, with a ditch on both sides, for the period of three years before the proceedings: *Held*, that this constituted, *prima facie*, a defense. *Follansbee v. City of Chicago*, 288.

BY WHOM TO BE DETERMINED.

10. *Validity of an ordinance in that regard.* Under the law on the subject of special assessments in the city of Chicago, for public improvements, the responsibility of prescribing what improvements shall be made, and the mode, manner, and extent of them is upon the common council. An ordinance which undertakes to vest in the board of public works the discretion of determining either the mode, manner, or extent of an improvement is void. *Walker v. City of Chicago*, 286.

DESCRIPTION OF PROPERTY IN THE ORDINANCE.

11. Upon the application of the collector of the city of Chicago for judgment upon a special assessment warrant, it was objected that the ordinance condemning the land did not contain a sufficient general description of the property. The land was described as "lot 8 and the north ten feet of lot 9 in block 93 of Elston's addition to Chicago, in accordance with the plan hereto annexed." The north line of lot 9 did not run due east and west, but in such a manner as to form an obtuse angle at its center, and the portion of lot 9 sought to be condemned, as shown by the plan attached to the ordinance, was indicated by running a line parallel with the north line of the lot, and at a distance of ten feet from it. The description in the ordinance was held sufficient. *City of Chicago v. Habar et al.* 283.

OF A NEW ASSESSMENT.

12. *Whether affected by deficiency in the original proceedings.* Where the ordinance of a city ordering the improvement of a street was valid, and

SPECIAL ASSESSMENTS. OF A NEW ASSESSMENT. Continued.

it appeared that the commissioners appointed to estimate the total expense to be assessed upon the real estate deemed specially benefited, and that chargeable upon the general fund, acted within their jurisdiction in making their report and estimate of the cost of the work, and the assessment failed only for want of proper notice for confirmation, it seems that such report and ordinance may be adopted in a new proceeding, by a proper reference, which conforms as near as may be in manner to that required for a first assessment. *Burton et al. v. City of Chicago*, 179.

EVIDENCE—COLLECTOR'S DELINQUENT LIST.

13. On application for judgment by a city for special assessments, the court received in evidence the collector's delinquent list: *Held*, no error, as the delinquent list is nothing more than the officer's return, which he makes under his official oath, and is conclusive evidence of the facts which he is required to state in it. *Goodrich v. City of Minnink*, 121.

PROOF AS TO PAYMENT.

14. It is also competent to prove by the city clerk that such assessments have not been paid since the return to him of the collector's warrant, but it seems not necessary, as the fact of payment should be shown affirmatively by the land owner. *Ibid.* 121.

NECESSITY OF A PROPER OBJECTION.

15. *To admit evidence.* In an application for a judgment upon a special assessment in the city of Chicago, the objector offered to prove that no notice had been given of the application for confirmation of the assessment, as required by the city charter: *Held*, as no such objection had been filed, the evidence was properly excluded. *Jerome v. City of Chicago*, 285.

DISCRETION AS TO FILING OBJECTION.

16. *At the hearing.* And upon objection that the court below erred in refusing to allow such objection to be filed on the hearing, it was *held*, that that was a matter resting in the discretion of the court, and as there was no affidavit upon which the application to file it was based, this court could not say that the discretion had been abused. *Ibid.* 285.

SPECIFIC PERFORMANCE. See CHANCERY, 15 to 19.

SPIRITUOUS LIQUORS.**SUPPRESSION OF THE SALE THEREOF.**

1. *And search of premises.* The charter of the city of Oneida, in Knox County, empowers the city council to declare the selling, giving away, or the keeping on hand for sale of any spirituous or intoxicating liquors, etc., within the city, a nuisance. An ordinance of said city

SPIRITUOUS LIQUORS. SUPPRESSION OF THE SALE THEREOF. Continued.

which authorized a search of dwelling-houses, etc., and the seizure of all liquors when found in a greater quantity than one gallon, etc., whether the intention was to sell them in the city, or ship them and sell elsewhere, was held to be void. *Sullivan v. Stephenson et al.* 290.

STATUTES.

CONSTITUTIONAL MODE OF PASSAGE.

1. *Majority required on receding from an amendment.* A bill for an act entitled "An act to increase the jurisdiction of justices of the peace and police magistrates," printed in the Session Laws of 1871, was regularly passed in the house of representatives. In the senate an amendment was adopted of matters not embraced in the title, and the bill as amended was passed by the constitutional majority on the call of the ayes and noes. The house refusing to concur in the amendment, the senate, by a vote of 23 to 16, receded from the amendment, which was all the action had on the bill by the senate. The senate consisted of 50 members, a majority of whom were necessary to the passage of a law: *Held*, that the bill never became a law. *The People ex rel. v. De Wolf*, 253.

CONSTRUCTION OF STATUTES.

2. *Whether to be given a retrospective effect.* The intention must be clearly expressed that a statute should retroact upon prior contracts and rights, before this court will so construe it. If the intention be doubtful, the construction will be that it operates prospectively only. *Hatcher v. Toledo, Wabash & Western Railroad Co.* 477.

3. *The rule as to strictness of construction.* Statutes conferring power to impose taxes are strictly construed. But where property is chargeable with taxes, and it is simply a question of which of two companies or persons, the one having the general property and the other a qualified one and using the same, shall pay the same, no reason is perceived for the application of the rule of strict construction. *Kennedy v. St. Louis, Vandalia & Terre Haute Railroad Co.* 395.

STATUTES CONSTRUED.

4. *Consolidated railroad companies—liability for debts of the original companies—act of 1867 construed in* *Hatcher v. Toledo, Wabash & Western Railroad Co.* 477. See **RAILROADS**, 1.

5. *Homestead—exemption from sale under judgment in a criminal prosecution against the husband.* Acts of 1851 and 1857. *Loomis v. Gerson*, 11. See **HOMESTEAD**, 1.

6. *Right of way—condemnation therefor—constitution of 1870 and act of 1852.* *The People ex rel. v. McRoberts*, 38. See **RIGHT OF WAY**, 1 to 8.

STATUTES. STATUTES CONSTRUED. *Continued.*

7. *Administrator's sale of land to pay debts—the word "seized," as used in section 103 of chapter of Wills, is synonymous with ownership.* *Hobson et al. v. Ewan*, 146. See ADMINISTRATION OF ESTATES, 14.

8. *Forcible entry—whether it will lie, under act of 1861.* *West v. Frederick*, 191. See FORCIBLE ENTRY AND DETAINER, 1.

STATUTE OF FRAUDS.

MANIFESTING A TRUST IN WRITING.

1. Where a party acquires title to land in trust for another, and writes to such other party a letter showing clearly that he holds the same in trust, this will be sufficient to manifest the trust as required by the statute of frauds; and where the letter fails to describe the lands, it may be shown by the facts and circumstances surrounding the case that it referred to land in dispute. *Moore et al. v. Pickett et al.* 158.

SUBROGATION.

WHERE ONE OF TWO MORTGAGORS PAYS THE DEBT. See MORTGAGES, 12.

SUBSCRIPTIONS.

BY MUNICIPAL CORPORATIONS.

1. *Prohibited by the constitution of 1870—and herein when that portion of the constitution took effect.* The separate articles of the constitution of 1870 of this State having been submitted to a vote of the people separately from the main body of the constitution, and adopted, became a part of the organic law of the State from and after the second day of July, 1870, and a constituent part of the same *eo instanti*. *Schall et al. v. Bowman et al.* 321.

TO STOCK OF RAILROAD BY MUNICIPAL CORPORATIONS.

2. *Excess of authority.* By the charter of the Dixon, Peoria & Hannibal Railroad Company, of March 5, 1867, each town and township through which the road might be located was authorized to subscribe and take stock of the company not exceeding \$35,000, upon a vote of the people in favor of the same. Under this law an election was had in the township of Elmwood upon two propositions for subscription, the first for \$35,000, and the other for \$40,000 additional to the first, both of which were carried and the bonds of the township issued: *Held*, on bill to enjoin the collection of taxes to pay the interest of the bonds that the subscription of \$35,000 was valid, but as to the \$40,000, the election and subscription were void, and a decree dismissing the bill was reversed. *Wiley et al. v. Silliman et al.* 170.

3. *Notice of election—subsequent legislation.* The charter required twenty days' notice of an election to authorize a municipal subscription to the company. The election was called and notices thereof given under the charter, and pending such call, and after posting no-

SUBSCRIPTIONS. TO STOCK OF RAILROAD BY MUNICIPAL CORPORATIONS.
Continued.

tice, the legislature passed an act authorizing towns to subscribe \$100,000 to this company—but no new notice was given under this act, and the election was held seven days after its passage: *Held*, that the amendatory act could not affect such election, and render a vote for a sum in excess of \$35,000 valid. *Wiley et al. v. Silliman et al.* 170.

4. *Curative legislation.* Where the people of a township at an election voted in favor of a subscription of \$40,000 to a railroad company without any authority of law, the general assembly afterward passed a special act declaring the election and subscription made under it to be legalized and binding on the township: *Held*, that as the election and subscription were null and void, and as the legislature could not create a debt against a municipal corporation without its consent, the curative act was void. *Ibid.* 170.

CONTRACT OF SUBSCRIPTION BY AN INDIVIDUAL.

5. *Construction thereof.* Where the locating committee of a proposed college required A, the owner of a tract of land near the proposed site of the college, to lay the same off into town lots, and give every eighth lot to the college as a condition to the selection of the proposed site, which he refused to do, until B and C, under a verbal agreement, purchased each a third interest of the land, including streets, alleys, and the lots demanded, at \$200 per acre; and A then, with the consent of B and C, entered into a written agreement with the college to give the lots demanded, which turned out to be six lots; and which agreement provided that the college lots, when laid off, should be appraised and considered as a subscription of so much stock to be equally divided between A, B, and C, reserving to them, however, the right to keep the lots at their appraised value: *Held*, that the agreement, though executed by A alone, was, in fact, an agreement by him and B and C to subscribe each two lots to the college, A giving two as belonging to himself, and two for each of the others as trustee, holding the legal title for them. *Cherry v. Carthage College*, 337.

6. B and C, under a verbal agreement, purchased each an undivided third of a tract of land of A, after which, by the consent of all, A executed a written agreement to the Carthage College to lay off the land into an addition to the town of Carthage, and give every eighth lot to the college, upon condition that the buildings were located at a point near the land; which lots should be appraised and considered as a subscription to be equally divided between A, B, and C, reserving to them the option to pay the appraised value and keep the lots. The land was laid out into forty-eight lots, six of which the college was entitled to under the agreement. Before their appraisal, B subscribed three shares, of \$100 each, in these words: "B, three shares, including two lots, or cash in lieu thereof, at the option of said B." At the first election of trustees, B paid five per cent of his subscription to entitle him

SUBSCRIPTIONS. CONTRACT OF SUBSCRIPTION BY AN INDIVIDUAL. *Continued.*

to vote, and A was allowed to vote six votes for the lots. The lots were afterward appraised, no two of them at less than \$300, and sold by the college, A making deeds therefor to the purchaser. A having repudiated his verbal contract with B to sell him one-third interest in the land, the college brought suit against B to recover the balance of his subscription: *Held*, from the circumstances of the case and the similarity of the options reserved in the agreement of A and B's subscription, that the two lots subscribed by B were the two mentioned in the agreement of A; that B's subscription was fully paid in the two lots he was entitled to under his verbal purchase of A, and which the college received; and that the payment of five per cent by B before the lots were appraised, could not be held to be an election to pay his subscription in money. *Cherry v. Carthage College*, 387.

SURETY.

WHEN SURETY PAYS THE DEBT.

1. *Measure of recovery against the principal.* Where a surety pays the debt of his principal for less than its face, he will be restricted in his recovery from the principal to the sum actually paid. *Coggeshall et al. v. Ruggles*, 401.

PRINCIPAL AND SURETY.

2. *Change of relation.* A, as principal, and B, as surety, being indebted in the sum of three hundred dollars by their joint note, sometime afterward B, becoming apprehensive of the inability of A to pay the same, purchased certain property of the latter, in part payment of which he agreed to assume and pay three hundred dollars on the note, which he failed to do, and judgment was obtained on the note against both: *Held*, that by this arrangement B became the principal debtor, as between himself and it, as to three hundred dollars and interest, in the judgment, and that he could not change such relation afterward without A's consent, by crediting the price of the property upon an indebtedness of A to him and his partner in trade. *Ibid.* 401.

3. *Keeping execution in life for benefit of surety after payment.* One of two judgment debtors, though surety for the other, can not after payment in fact by him of the judgment, by arrangement with the creditor holding the same to keep it in apparent life, manage to sell the lands of his co-defendant, and thereby acquire and attain a title to the same. While a court of equity will not treat an execution issued thereon as a nullity, yet if such party, so controlling the judgment after such payment, procures a sale of his co-defendant's lands, on execution under the same, and the transfer of the certificate of purchase to his son, it will treat the certificate as a mere security for the money advanced, and which he is entitled to recover of the principal debtor. *Ibid.* 401.

SURETY. Continued.**STRICT CONSTRUCTION.**

4. *In favor of surety.* The contract of a surety is strictly construed, and his liability is never extended beyond the terms of his agreement, or at least its manifest purport. In case of doubt, the doubt is generally, if not universally, solved in his favor. *Stull et al. v. Hance*, 52.

CONTRACT CONSTRUED.

5. *Whether joint contractor or surety.* Where a contract for the building of a house described A as principal, and B and C as sureties, who were not again named in the instrument, and in fixing the terms and conditions, reference was made to the party of the first part, and to the party of the second part, without naming the persons; and in referring to the party of the first part, the singular pronouns "he" and "him" were used, and the principal signed first with the other two under his name at the usual place, and the word "contractors" was written opposite their names: *Held*, that A was the contractor, and that B and C were only sureties; and that the word "contractors," after their names, should not control the manifest intention of the parties appearing in the body of the contract. *Ibid.* 52.

6. Had the word "as" not been employed, there might have been some plausibility in urging that the word "sureties" was only descriptive of the person. But when the parties are described "as sureties," this renders their character of sureties clear beyond doubt. *Ibid.* 52.

SURETY NOT LIABLE TO THIRD PERSONS.

7. Where A undertook to build a school house, and entered into a written agreement therefor to the school directors, with B and C as sureties for his performance, and A employed the plaintiff to assist him in the work, B and C having nothing whatever to do in the hiring or prosecution of the work, and after the completion of the work, plaintiff settled with A, when there was found to be due the plaintiff \$59.50 for work, and \$25 for money loaned to pay other hands employed on the work: *Held*, that B and C were not liable to the plaintiff for the sums found to be due him, as they were not joint contractors with A. *Ibid.* 52.

TAXATION.**OF THE RULE OF EQUALITY AND UNIFORMITY.**

1. Where special taxes are levied, not upon the valuation of the lands assessed, nor confined to the special benefits conferred by the proposed improvement for which they were authorized, it will be a violation of the principles of equality and uniformity required by the constitution, and the taxes will be illegal. *Lee v. Ruggles*, 427.

2. So, where, by a special act of the legislature, passed in 1859, a special tax was authorized to be levied upon certain lands for draining the same, and three commissioners were appointed to carry out the ob-

TAXATION. OF THE RULE OF EQUALITY AND UNIFORMITY. *Continued.*

ject of the act; and two other persons named in the act, with such other disinterested person as they might associate with them, were appointed to classify the lands into three classes, so that the tracts to be most benefited by the drainage should be placed in the first class, and those least benefited in the third class, and return such classification to the commissioners; and it was made the duty of the latter to levy upon the lands described a tax sufficient to complete the drainage of the same, the first class paying the highest rate on the county assessor's assessment, not exceeding fifty cents per acre, the second class to be such a per centage on said assessment; not, however, to exceed forty cents per acre, and the third class in the same way, the rate, however, not to exceed thirty cents per acre: *Held*, that taxes levied under such act were illegal, for the reason that a sufficient sum was required to be levied upon the lands to complete their drainage, not exceeding fifty, forty, and thirty cents per acre in their respective classes, without any regard to whether the lands were benefited to the extent of the tax or not. *Lee v. Ruggles*, 427.

3. A tax assessed upon the basis of dividing the lands into three classes according to the difference in benefits, fixing a maximum rate of taxation in each class, and making an arbitrary difference of ten cents per acre in the different classes respectively, is not a tax assessed upon each tract only to the extent of the special benefits conferred upon it. *Ibid.* 427.

ROLLING STOCK OF RAILROAD COMPANY.

4. *Property used but not owned* — *Pullman sleeping cars*. Under the act of April 9, 1869, entitled "An act for the collection of railroad taxes in certain counties, cities, and towns," the persons or company operating a railroad are liable for the taxes upon the rolling stock used upon such road, without reference to the ownership of the road or the rolling stock so used. *Kennedy v. St. Louis, Vandalia & Terre Haute Railroad Co.* 395.

5. By a written agreement with the Pullman Palace Car Company, a railroad company employed on its road sleeping cars of the car company, hauled the same, furnished fuel and lights, kept them in running order, and received its ordinary fare for the transportation of passengers in them. The car company was bound to keep in repair the carpets, upholstery, and bedding, excepting repairs necessary from accident and casualty while being run on the road; received the fare for the extra accommodation, and furnished its own employees to receive the same and wait upon passengers: *Held*, that, although the general property in the cars was in the car company, yet the railroad company had such a community of interest and such a qualified property in them for the time being, that, for the purposes of taxation, they must be regarded, under the statute, as belonging to the rolling stock of the railroad company, and subject to be taxed as such. *Ibid.* 395.

TAXATION. *Continued.*

TAXATION FOR CORPORATE PURPOSES.

6. Who are "corporate authorities," for the purpose of levying taxes. Where commissioners were appointed, by act of the legislature, to levy special taxes upon certain lands for the purpose of drainage, and the act provided that the same should be submitted to a vote of the legal voters of the district to be drained, owning or occupying lands within the same, and that, unless adopted, it should be of no force, if the act is adopted by vote, as required, such commissioners may be regarded as corporate authorities, under the constitution of 1848, and might be vested with power to assess and collect taxes for corporate purposes. *Lee v. Ruggles*, 427.

7. Town officers, under the township system, making an appropriation to a railroad company, in pursuance of law, upon the vote of a majority of the legal voters of the town authorizing the same, are "corporate authorities" of a municipal corporation, who are authorized to levy taxes under the constitution of 1848. *Chicago, Danville & Vincennes Railroad Co. et al. v. Smith*, 268.

8. What is a corporate purpose. A tax or appropriation for a corporate purpose is one for the benefit of the inhabitants of the municipality. Taxes levied by township authorities to aid in the construction of a railroad is a corporate purpose; and, in this respect, the distinction between a donation in aid of a railroad and a subscription to the capital stock of the corporation, is more shadowy than real. The power is granted in consideration of the public benefits, and these are as great in one case as in the other. *Ibid.* 268.

9. If it were true that railroad corporations are strictly private, that the benefits resulting to the public from the construction of railroads are purely incidental, and that the profits arising from their operation merely enrich the individuals composing the private corporation, it might logically follow that all laws imposing taxes to aid in the building of railroads to be owned and operated by such corporations are unconstitutional, because appropriating taxes to a private and not a public purpose. *Ibid.* 268.

10. This court has decided that railroad corporations are created for the public good; to increase the facilities and conveniences, and promote the great ends of commerce; and that they can not organize monopolies, or make contracts injurious to the public interests. The courts, for many years past, have recognized railroads as public improvements, made to subserve the public interests. When it is also considered that the legislature and the courts have uniformly held that they are of such public use as to justify the exercise of the right of eminent domain, the position is thereby much strengthened that taxation for such an enterprise is for a public purpose, although the distinction between the right of eminent domain and taxation is manifest. *Ibid.* 268.

TAXATION. TAXATION FOR CORPORATE PURPOSES. *Continued.*

11. In view of the past history of railroads; the impossibility of dispensing with them; the necessity for an increase in their number, to open more outlets for the products of our fertile and inexhaustible soil — facts all well known to the legislature — this court must hold that, even if the appropriation of taxes, in this case, was not for a public purpose in the broadest sense, the character of the purpose is involved in such doubt that it can not declare the action of the legislature void. *Chicago, Danville & Vincennes Railroad Co. et al. v. Smith*, 268.

WHOSE DUTY TO PAY TAXES.

12. *Of a mortgagor.* It is the duty of the mortgagor, or his grantee, when in possession, to pay the taxes on the mortgaged premises; and he can acquire no rights by the discharge of such duty. The mortgagee may well regard such payment as a protection of his interest. *Medley et al. v. Elliott et al.* 532.

DELINQUENT TAXES AND SPECIAL ASSESSMENTS.

13. *Who may apply for judgment therefor—and sell under constitution of 1870.* The authority vested in the city collector of Chicago, by virtue of the charter of the city, upon application to the court to obtain an order for the sale of real estate for the payment of delinquent city taxes and unpaid special assessments was abrogated by sec. 4 of article 9 of the constitution of 1870, which requires the legislature to provide in all cases where necessary to sell real estate for the non-payment of taxes or assessments for State, county, municipal, or other purposes, that a return shall be made to some general officer of the county having authority to receive State and county taxes, and vests in such officer alone, upon the order or judgment of some court of record, the power to sell. *Otis v. City of Chicago*, 299.

14. And, as held in *Hills v. The City of Chicago*, 60 Ill. 86, this provision of the constitution went into effect immediately upon the adoption of that instrument, its operation not awaiting the action of the legislature in designating to what general officer the returns should be made. *Ibid.* 299.

15. Under the 4th section of article 9 of the constitution of 1870, a city collector is prohibited from making sales of real estate for the non-payment of taxes or special assessments, and, consequently, such officer is not authorized to apply for judgment. The application and sale must be made by some general officer having authority to receive State and county taxes. *Webster v. City of Chicago*, 302.

EXEMPTION FROM TAXATION.

16. *Under the charter of Shawneetown.* The first section of the ninth article of the charter of Shawneetown, in terms, purported to exempt the inhabitants of that city from all State taxes for the period of twenty years, and required the levy of a tax, by the city, on the property of the inhabitants, equal to the tax released by the State, to be used ex-

TAXATION. EXEMPTION FROM TAXATION. *Continued.*

clusively in constructing a levee to protect the city from overflow: *Held*, that so far as the section exempted the property of the inhabitants from State taxes, it was clearly in conflict with the second section of the ninth article of the constitution of 1848, and therefore void. *The People ex rel. v. Barger*, 452.

17. The mere fact that the city council was authorized to levy a tax equal in amount to the State tax released, for local improvements, does not change the material fact of an attempt to release the right of the State to tax the inhabitants for State purposes; and the tax for levee purposes is in no sense a State tax. *Ibid.* 452.

Under the constitution of 1848, the legislature had not the power to exempt a portion of the inhabitants of the State in any locality from State taxes, and impose the entire burden upon the remaining portion. *Ibid.* 452.

COMMUTATION OF TAXES.

18. The case of the *Illinois Central R. R. Co. v. County of McLean*, 17 Ill. 291, holding that a commutation of taxes in that case was constitutional, is based upon the principle that the proportion of the company required to be paid to the State in lieu of taxes, was equal to the burden of the taxes released. The case can be supported on no other principle. *Ibid.* 452.

19. But when the State receives nothing in consideration for releasing the inhabitants of a city from State taxes, and the tax imposed in lieu thereof is purely for local purposes, in which the people of the State at large have no benefit, it can not be regarded as a commutation. *Ibid.* 452.

EXEMPTION FOR CHARITABLE PURPOSES.

20. The words "charitable purposes," in the third section of the ninth article of the constitution of 1848, which provides that "the property of the State and counties, both real and personal, and such other property as the general assembly shall deem necessary for schools, religious and *charitable purposes*, may be exempt from taxation," will not be construed to include the building and construction of a levee for the protection of the private property of the citizen. Under this clause, the right to collect a State tax in a locality can not be released for a series of years, and an equal tax collected to build a levee by a city in lieu thereof. *Ibid.* 452.

TENANTS IN COMMON.

DIVISION OF LAND BETWEEN THEM.

1. Where the land of two joint owners is divided by the parties without either knowing which part he will receive as his share, it will be presumed that the division was fairly made, or as nearly so as the parties were able to make it. *Fisher v. Dillon*, 379.

TENDER.**AFTER SUIT BROUGHT.**

1. In a suit to recover unliquidated damages for breach of contract, the defendant filed a plea averring a tender of money after suit brought, to which the court sustained a demurrer: *Held*, that the plea was not a good defense, either at common law or under our statute. *Gregory v. Wells*, 232.

BILL FOR SPECIFIC PERFORMANCE.

2. *By vendee against vendor—previous tender not necessary.* See CHANCERY.

TEXAS AND CHEROKEE CATTLE.**WHERE THERE ARE DIFFERENT OWNERS.**

1. *Which liable for infection.* Where two separate lots of Texas or Cherokee cattle, owned and in the possession of separate owners in this State contrary to the statute of 1867, were each on the same feeding ground or section where the cattle of the plaintiff were being herded, and plaintiff's cattle became infected, from which they died, the court, in a suit against the owners of one lot of these cattle, instructed the jury, that if plaintiff's cattle took the disease from either lot of the Texas cattle, and the testimony as to which lot communicated the disease was equally balanced, to find for defendants: *Held*, that the instruction was erroneous. If both lots of cattle contributed to infect plaintiff's cattle, so that it was impossible to say that one lot was more concerned in doing so than the other, it seems that the defendants were liable. *Newkirk v. Milk et al.* 172.

2. In such a case it is not error to refuse an instruction for the plaintiff that if the Texas or Cherokee cattle that were on the section where plaintiff's cattle run, infected plaintiff's cattle with disease, of which they died, then the defendants were liable, and could not be acquitted on the ground that the damages might have accrued from the acts of the owners of the other lot of cattle. If the disease was contracted from the other lot of cattle, defendants were not liable. *Ibid.* 172.

3. Neither was it error to refuse an instruction that if Texas or Cherokee cattle imparted the disease to plaintiff's cattle, without limiting it to defendants' cattle, the jury should find defendants guilty. *Ibid.* 172.

TIME.**COMPUTATION OF TIME.**

On publication of notice for sixty days under the attachment act. See ATTACHMENT, 1.

TRESPASS.**PRESERVATION OF ORDER IN ONE'S FAMILY.**

1. *Rights of parent and child.* The authority to govern is placed by the law in the hands of the father, as the head of the family. It is as unlawful for a grown son or daughter to create a disturbance in the family as for a mere stranger; and the father may as rightfully interpose to preserve the good order and propriety of his household in the one case as in the other. *Smith v. Slocum*, 354.

2. Where a grown daughter, who had been married and had left her husband and was living in her father's family, got into an angry dispute with a hired girl, and when ordered by her father to leave and go to her own room, refused to do so, and in her dispute with her father, made remarks imputing a want of chastity in her step-mother in her presence, and in that of several others, it was held that the father had a right to protect his wife from such slanderous abuse the same as from a mere stranger, and to exercise his authority as the head of the family in moderation to preserve the order of his family; and if in so doing he used no more force than was necessary, he was not liable in trespass. *Ibid.* 354.

TRUSTS.**WHEN A TRUST ARISES.**

1. Where the owner of land which had been sold under execution, made an arrangement with his tenant to redeem the same, and the tenant took an assignment of the certificate of purchase in his own name, while acting as the agent of the owner, his landlord, and afterward procured the sheriff to make a deed to himself instead of to his principal, it seems that this in equity will constitute such agent the trustee of the principal. *Moore et al. v. Pickett et al.* 158.

MANIFESTING THE TRUST IN WRITING.

2. *Within the statute of frauds.* See STATUTE OF FRAUDS, 1.

USURY.**UNDER THE GUISE OF LIQUIDATED DAMAGES.**

1. Where promissory notes, made up of several prior notes and dealings between the same parties, were made payable thirty days after date at ten per cent interest, and if not paid at maturity, twenty per cent after maturity, as liquidated damages, and it was shown that in the beginning of the dealings between the parties it was understood that the payee was to pay twenty per cent interest for all moneys loaned to him, if not paid in thirty days; that when the last notes were given payable in thirty days, the payee had agreed to let them run for a year; that at least three of the previous notes merged in these, were drawn in the same form; and it appeared, by the admissions of the payee, that this was a form adopted by him to obtain twenty per cent interest,

USURY. UNDER THE GUISE OF LIQUIDATED DAMAGES. Continued.

without violating the statute, as he supposed: *Held*, that the twenty per cent expressed to be liquidated damages was not such in good faith, but a mere device to cover up an usurious transaction. *Pike v. Crist et al.* 461.

WHO MAY PLEAD USURY.

2. Where a purchaser of land from a mortgagor received a deed of warranty which, after reciting that it was subject to certain mortgages, contained this clause: "all three of which mortgages the above grantee assumes and agrees to pay, except any usurious and illegal interest in the same:" *Held*, that, as under this clause, the right of the mortgagor to an abatement of the usury entered into the consideration of the purchase as an element of the price, the grantee had the right to question the validity of the mortgages in respect to usury. *Ibid.* 461.

INTEREST RECOVERABLE.

3. *On an usurious contract.* Where a part of the principal of notes secured by mortgages was composed of usury, and an usurious rate of interest was expressed on the face of the notes under the guise of liquidated damages if not paid at maturity, the circuit court, after finding the sum actually due after deducting the usury, allowed but six per cent interest on that sum from the date of the notes, instead of the ten per cent, on bill filed by the grantee of the mortgagor: *Held*, no error, as this court has adopted six per cent as that which equity requires a party seeking relief shall pay in such cases. *Ibid.* 461.

EXTENT OF RECOVERY AT LAW.

4. A judgment found upon a note which upon its face reserves an usurious rate of interest should be for the principal alone. *Hefner v. Vandolah*, 483.

VENDOR AND PURCHASER.**OF A NEW CONTRACT.**

1. A seller makes an offer, and the purchaser accepts and pays the price; but, before receiving deed, he takes back his money, and takes under a contract to pay at a future day, and upon conditions: *Held*, that he thereby waives any equitable rights growing out of the original transaction. *Oliver v. Board of Supervisors of Livingston Co.* 528.

FORFEITURE—RE-SALE.

2. A contract in the usual form of a forfeit bond, in which conditions precedent are imposed upon the purchaser, wherein time is of the essence of the contract, and the right to declare a forfeiture is reserved, upon non-performance by the purchaser, may be disregarded and the property resold to another. *Ibid.* 528.

WHETHER A MORTGAGE.

3. Such contract has none of the elements of a mortgage, and the delinquent can have no standing in a court of equity.

VENDOR AND PURCHASER. *Continued.***FORFEITURE.**

4. A right of forfeiture, although tolerated, is not favored in courts of equity. Where the party seeking to enforce such right, by his conduct has misled others, and suffered them to acquire rights in ignorance of his right to declare a forfeiture when called upon to disclose the true state of the facts, a court of equity will not allow him to exact a forfeiture. *Fitzhugh et al. v. Smith*, 486.

5. Thus, where a vendor had, in his contract for the sale of land, reserved the right to declare a forfeiture for non-compliance with its terms, and the contract was not recorded so as to afford notice of its terms, and when made a party defendant in a judicial proceeding against his vendee to establish and enforce a lien, and subject the interest of the vendee to sale, and failed to answer and disclose the terms of the contract and his right to insist on a forfeiture, or even to give notice thereof, but suffered the creditors to proceed to decree, and to advertise the sale of the premises, and then notified them of his intention to declare a forfeiture only three days before the sale, it was held that by his conduct he had waived his right to declare a forfeiture as against the rights of such creditors. *Ibid.* 486.

ESTOPPEL.

6. *Vendor estopped to defeat the title of his second grantee.* Where a party made a conveyance of a tract of land to B, and received the purchase money, and afterward brought suit by attachment against A, a former grantee of the plaintiff, whose deed was unrecorded, to recover a sum due from him, and attached the same land, and B interpleaded, claiming title: *Held*, that on the trial of the issue on the interpleader the plaintiff was estopped from defeating the title of B, even by showing that the latter had notice at the time of his purchase of the prior unrecorded deed. *Needham v. Clury*, 344.

WHETHER THE RELATION EXISTS. See **FORCIBLE ENTRY AND DETAINER**, 1.

SPECIFIC PERFORMANCE.

By vendee against vendor. See **CHANCERY**, 15 to 19.

VERDICT.**JURY SEALING VERDICT AND DISPERSING.**

1. *Effect of the irregularity.* The court, when about to adjourn for the day, in the absence of defendant's counsel, directed the sheriff to allow the jury upon agreement to seal up their verdict and disperse, with instruction to meet the court in the morning, which was done. In the morning the jury met the court and delivered their verdict, the defendant's counsel being present. The court refused to set aside the verdict for the cause stated: *Held*, that, as it does not appear that defendant was

VERDICT. JURY SEALING VERDICT AND DISPERSING. *Continued.*

in any manner prejudiced, the irregularity was no ground for setting aside the verdict. *Mains v. Cosner*, 465.

MODE OF ARRIVING AT A VERDICT BY THE JURY. See **RIGHTS OF WAY**, 15, 16, 17.

WAR.

EFFECT OF A STATE OF WAR ON ACCRUING INTEREST. See **PROMISSORY NOTE**, 3.

WARRANTY.**MARINE INSURANCE.**

Implied warranty as to sea-worthiness. See **INSURANCE**, 1, 2, 3.

WILLS.**TESTAMENTARY CAPACITY.**

1. *Of the rule or test in respect thereto.* From the fact that a man might not be competent to make a will of one kind, and under some circumstances, owing to the nature and extent of the estate, the number of objects and the character of the disposition, when under other and different circumstances requiring less mental effort, he might be, the court appreciates the difficulty in attempting to lay down any definite rule in respect to the exact amount of mental capacity requisite to the making of a valid will. *Trish et al. v. Newell et al.* 196.

2. The best form in which to submit the question to a jury, is, whether the mind and memory of the testator was sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will, judging his competency of mind by the nature of the act to be done, from a consideration of all the circumstances of the case. *Ibid.* 196.

3. To be of sound and disposing mind and memory, a person should be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection of the property he means to dispose of; of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should comprehend the provisions of his will in their legal form. It is sufficient if he understands the elements of which it is composed—the disposition of his property in its simple forms. *Ibid.* 196.

4. Upon the question of testamentary capacity, the court charged the jury that they must be satisfied, from the evidence, that the testator “had sufficient strength of mind and memory to take into account and retain in his mind, without dictation from others, the nature and objects of his bounty, the nature and character of his property, and the manner in which he was disposing of it; the person who was the natural

WILLS. TESTAMENTARY CAPACITY. *Continued.*

object of his bounty, and her claims upon him; the relation which he sustained toward them, who, by the will, were made the recipients of his bounty; and his mind should be sufficient to enable him to have a comprehension that he was disposing of his property by will, and to know how it was being disposed of by said will." *Held*, that the charge was erroneous. *Trish et al. v. Newell et al.* 196.

5. The court further instructed, "that in order to have sufficient capacity to make a valid will, the testator must have something more than mere passive memory; he must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and be able to form some rational judgment in regard to them:" *Held*, objectionable, as requiring a capacity not possessed by a great portion of mankind, even without the impairing effect of disease. *Ibid.* 186.

MONEY—WHEN TREATED AS REALTY.

6. Even a direction in a will to sell land for a particular purpose does not indicate an intention to convert real into personal estate to *all intents*, so that the surplus of the proceeds will pass under a residuary bequest of personalty. Every conversion, however absolute, will be deemed a conversion for the purpose of the will only, unless the testator distinctly indicates a different intention. *Richards v. Miller*, 417.

7. Where a will, by its terms, gave no direction for the sale of real estate, and created no charge upon the land for the payment of legacies, but, after directing the payment of debts and personal expenses, contained this clause: "I give, devise, etc., the remainder of my estate:" *Held*, that if the right to sell real estate embraced in the residuary devise to pay legacies were conceded, the legacies would be a charge by implication only, resulting from a deficiency of personal assets; and the right to sell would be limited to the necessity, and the surplus of the proceeds, after satisfying the debts and legacies, would retain the character of real estate. *Ibid.* 417.

8. In such case, if the county court should direct the sale of the whole of the real estate for the payment of debts and legacies, it will be presumed that the whole was ordered to be sold because not susceptible of division without injury to the estate; and such sale will not convert the surplus proceeds into personal estate, but it will be treated in the final distribution as realty. *Ibid.* 417.

DEVISE TO "HEIRS-AT-LAW."

9. *Who will take thereunder.* The rule rigidly adhered to by the courts is, that the words employed by a testator in his will, will be presumed to have been used in their strict and primary sense, unless the context shows them to have been used in a different sense. When not thus ex-

WILLS. DEVISE TO "HEIRS-AT-LAW." *Continued.*

plained, their legal and technical meaning will be enforced. Thus, the word *heirs*, unexplained by the context, will be held to mean the persons appointed by law to succeed to the estate in case of intestacy. *Richards v. Miller*, 417. †

10. An heir is one who inherits or takes from another by descent, as distinguished from a devisee, who takes by will. He is one upon whom the law casts the estate immediately upon the death of the owner. When property is devised to the testator's heirs-at-law, without other designation, it passes as in case of intestacy. *Ibid.* 417.

11. When gifts by will to heirs-at-law are made to them *simpliciter*, the persons to take and the proportions must be determined by the statute of descents and distribution. So, where a testatrix, after directing the payment of her funeral expenses and debts, and certain pecuniary legacies, provided in her will as follows: "I give, devise, and bequeath to my heirs-at-law the remainder of my estate," and she died, leaving a husband, and brothers, sisters, and descendants of brothers and sisters, but no children, father, or mother: *Held*, that her husband, being an heir-at-law, was entitled to one-half of the real estate left by the testatrix, under such clause, or the surplus of the proceeds of its sale to pay debts and legacies which was held to be realty under the will; and this, notwithstanding a prior specific bequest to him. *Ibid.* 417.

12. This case is distinguished from *Piney v. Brown*, 44 Ill. 363. In that case the fund was directed to be "equally divided" between A and the heirs of B, and the court there held that A and each of the heirs of B took *per capita*, and not *per stirpes*. In that case the gift was not to a class, as in this, to be ascertained by reference to the statute, but to certain individuals, as if personally named. When the words "equally," "share and share alike," or "to be equally divided" are used in a will, they mean a division *per capita*. *Ibid.* 417.

13. *Parol evidence to explain who meant by "heirs-at-law."* Where a residuary devise in a will was in the words: "I give, devise, and bequeath to my heirs-at-law the remainder of my estate:" *Held*, that parol evidence of the instructions given by the testatrix to the scrivener who drafted the will, for the purpose of explaining who she meant by the words heirs-at-law, was not admissible. *Ibid.* 417.

14. *Parol evidence to identify heirs, etc.* But proof of the amount and nature of the fund to be distributed, to show whether personalty or realty, and the names of the persons who sustained such relations to the testatrix as would constitute them heirs-at-law, is not only proper, but necessary to an order of distribution. But such proof does not raise a latent ambiguity to justify proof of the declarations of the testatrix, made at the writing of the will, to show who she considered her heirs. *Ibid.* 417.

WILLS. *Continued.*

ALTERATION—NEW ATTESTATION REQUIRED.

15. A testator, after the publication of his will, sent for the executor and custodian of the same, and informed him that he wished to alter his will so that A should have a tract of land devised therein to B, and the executor, at the instance of the testator, cancelled the name of B by drawing a line through it with a pen, leaving the name still legible, and interlined over it the name of A, so that the devise read as to A; but the will, as altered, was never republished, or attested by two witnesses in the presence of the testator; *Held*, that in favor of A, for want of attestation, the will, as altered, was wholly inoperative. *Wolf v. Bollinger*, 368.

REVOCATION OF WILL.

16. The mere act of cancellation, erasure, or obliteration, will not constitute a valid revocation of a will, unless done with intent to revoke. Although every act of cancellation imports *prima facie* that it is done with intent to revoke, this presumption may be rebutted by the accompanying circumstances. *Ibid.* 368.

17. When a testator makes an alteration in his will by erasure and interlineation, or in any other mode without authenticating the same by a new attestation in the presence of witnesses, or other form required by the statute, it will be presumed that the alteration was intended to be dependent upon the alteration taking effect as a substitute; and when such alteration fails to take effect, the will will stand as originally drawn, so far as the same is legible after the attempted alteration. *Ibid.* 368.

18. Thus when a testator directed the erasure of the name of a devisee, and the interlineation of the name of another person, with intent not to revoke the devise itself, but simply to substitute another devisee in place of the original one, which was done by drawing a pen through the original name, but still leaving it legible, and the alteration failed for want of a new attestation: *Held*, that the erasure of the name of the original devisee did not amount to a revocation of the devise to her. *Ibid.* 368.

CONTESTING A WILL.

19. *Who may contest it.* Under the sixth section of the statute of wills, a devisee may contest whether or not certain portions of a will, as admitted to probate, is the will of the testator. The right is given to "any person interested," and these words may embrace a devisee as well as an heir-at-law. *Ibid.* 368.

20. *Trial by jury.* On bill in chancery to contest the validity of an alleged devise, where there is no disputed question of fact to be found, it is not erroneous to hear the cause without submitting an issue to a jury. Proceeding to a hearing without objection, or asking for an issue to be made and tried by a jury, will be a waiver of the right to a trial by jury. *Ibid.* 368.

WILLS. CONTESTING A WILL. *Continued.*

21. *Any portion may be contested.* The power conferred upon courts of equity by the sixth section of the statute of wills to determine whether a writing admitted to probate, be the will of the testator or not, includes the power to adjudge upon the validity of any part of the instrument as well as the whole. *Wolf v. Bollinger*, 368.

22. *Extent of relief on contest of will.* Where a testator altered his will after its attestation by attempting to obliterate the name of a devisee, and having another name interlined as a substitute therefor, but failed to have the will, as altered, attested according to law, and the same was admitted to probate in its altered condition: *Held*, on bill in chancery by the original devisee to contest the right of the substituted devisee, that equity had jurisdiction not only to declare that one party was not the devisee, but also to establish the will in favor of the original devisee whose name was still legible, and thus settle the entire question by determining which of the two parties was entitled to take as devisee. *Ibid.* 368.

23. *Burden of proof.* On a bill in chancery to contest a will after its admission to probate, the burden of proof is on those seeking to maintain the will, to show that at the time of its execution the testator was of sound mind and memory, to the extent of understanding what he was about. *Irish et al. v. Newell et al.* 196.

24. *Preponderance of proof.* On the trial of an issue, whether an instrument purporting to be a will, was the will of the testator, the court, in substance, charged the jury that it should appear, from *all* the evidence, that it was not the result of undue influence exerted by others over a weak and enfeebled intellect, to the extent of substituting their will for his: *Held*, that the instruction was calculated to confuse and mislead the jury. It requires the fact to appear from *all* the evidence, without regard to the preponderance of proof on the point. *Ibid.* 196.

BY WHAT LAW TO BE GOVERNED.

25. *Bequest of personalty.* Where a will designates a particular class or description of persons as taking under it, the proper persons who are entitled to take must be ascertained by the law of the place where the will is made, and the testator is domiciled. Thus, if a testator should bequeath personal estate to his "heirs-at-law," the law of his domicile will determine the persons entitled to take under such description. *Richards v. Miller*, 417.

26. *Devise of realty.* The law of the place where real estate devised is situate, governs in the construction and interpretation of the will. Thus, if a residuary devise, under which is included land, or money arising from its sale, treated as realty, is made to the "heirs-at-law" of the testatrix, without designation by name, or words showing a different intention, such realty will pass to the heirs-at-law of the testatrix as in case of intestacy, according to the statute of the State in which the real estate is situated. *Ibid.* 417.

WILLS. Continued.**WORDS TO PASS REAL ESTATE.**

27. The words, "I give, devise, and bequeath to my heirs-at-law the remainder of my estate," are sufficient to embrace and pass real estate left by the testator. *Richards v. Miller*, 417.

THE RULE IN SHELLEY'S CASE.

28. *Is in force in Illinois.* The common law of England, so far as applicable and of a general nature, having been adopted in this State at an early date and continued in force by statute, except so far as the same has been repealed, it follows that the rule in Shelley's case, which is a part of the common law, is in force in this State, it being in harmony with the genius of our institutions, and not in conflict with any statutory provision. *Baker et al. v. Scott*, 86.

29. *What the rule is.* At common law the rule in Shelley's case is not a rule of interpretation, but a rule of property, under and by which all devisees of legal estates wherein lands are given to a person for life, or for any greater estate, with an immediate remainder to the "*heirs*," or "*heirs of the body*," of such devisee, the word heirs, or heirs of the body, will operate as words of limitation, and give the devisee an estate in fee simple or in fee tail. *Ibid.* 86.

30. *Requisites of the rule.* The requisites of the rule in Shelley's case are, that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs, or heirs of the body of the person taking that estate, by that name, and not to the heirs as meaning or explained to be sons, children, etc.; the heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or, at least, so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor, shall both owe their effect to the same deed, will, or writing; and that the several limitations shall give interests of the same quality, both legal or both equitable. *Ibid.* 86.

31. *Limitation.* The rule does not apply when the words lawful issue, sons, or children, are used, instead of the word "*heirs*," because those words are regarded as words of purchase, and not of limitation; and the ancestor, when such words are used, will take only a life estate, and his sons and children will take by purchase, or under the will, for the reason that they are a designation of persons to take originally in their own right. When taking in character of heir, he must take in quality of heir, that is, by descent. *Ibid.* 86.

32. *The rule applied in this case.* A testator, by the terms of his will, devised to his daughter one-third of all his property left after the payment of debts, with the following limitation: "and it is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education, until she is twenty-three years of age, after which she may come into possession of

WILLS. THE RULE IN SHELLEY'S CASE. *Continued.*

the full amount of rents and profits, the principal to descend to her heirs: *Held*, that the rule in Shelley's case was applicable to such devise, and by it the daughter took an estate of inheritance in fee simple in one-third of the lands of the testator left after the payment of debts. *Baker et al. v. Scott.*

33. *Rule not affected by a power of sale.* And the fact that a mere naked power was given to the executors to sell certain town lots upon a certain contingency, where no trust was created, was held not to affect the application of the rule. *Ibid.* 86.

WITNESSES.

COMPETENCY.

1. *Under act of 1867.* On the trial of a claim against the administrator of an estate, the husband of an heir-at-law of the deceased, as well as the wife, is a competent witness when called by the administrator to prove conversations and transactions between the claimant and the intestate which are relevant to the issue. *Freeman et al. v. Freeman*, 189.

2. When a witness, in behalf of the representatives of a deceased party, is allowed to testify to conversations and transactions between the deceased and one prosecuting a claim against the estate, the claimant also will be allowed to testify in respect to the same conversations or transactions. *Ibid.* 189.

3. Where the husband, being the owner of property which was his homestead, exchanged the same for Missouri lands, taking a conveyance therefor to his wife, and afterward united with his wife in a bill for rescission on the ground of false representations, and on the hearing offered to prove, by his wife, the representations of the defendant, which the court refused to allow: *Held*, that the court ruled correctly, as the suit was not the case of the wife in any correct legal sense, *Mitchell et al. v. McDougall*, 498.

Ex. 1, 2, 3, 4

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